TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~154~~ 24

HENRY B. TYLER, PLAINTIFF IN ERROR,

vs.

JOHN D. DEFREES.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 12, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 365.

HENRY B. TYLER, PLAINTIFF IN ERROR,

vs.

JOHN D. DEFREES.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Henry B. Tyler, plaintiff, and John D. Defrees, defendant, a manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable S. P. Chase, Chief Justice of the United States, this 6th day of November, in the year of our Lord 1868, and of the independence of the United States the 93d.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To John D. Defrees:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Henry B. Tyler is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

November 6, 1868.

D. K. CARTTER,
Ch'f Justice.

Service acknowledged this 13 Nov., 1868.

A. G. RIDDLE,
Counsel for Def't.

(Indorsed:) 3,501. Henry B. Tyler vs. John De Defrees. Writ of error and citation. Filed 6th Nov., 1868. Service acknowledged.

2 *Declaration.—Filed Jan.* 18, '67.

In the supreme court of the District of Columbia.

HENRY B. TYLER
vs.
JOHN D. DEFREES. } At law.—No. 3,501.

The plaintiff sues the defendant to recover the west half of lot numbered six (6) in square numbered four hundred and fifty-five, as the

same is known and described on the ground-plats and plans of the city of Washington, in the District of Columbia, and recorded in the land records of said district, of which the plaintiff was lawfully possessed on the first day of January, in the year of our Lord eighteen hundred and sixty-seven, when the defendant entered the same, and unlawfully ejected the plaintiff therefrom, and unjustly detains the same from the plaintiff; and the plaintiff claims the possession of said part of said lot, with the improvements and appurtenances, and damages for the wrong aforesaid, five thousand dollars.

BRENT & MERRICK,
Att'ys for Plaintiff.

3 The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

BRENT & MERRICK,
Att'ys for Plaintiff.

Summons issued 28th Jan'y, '67.

In the supreme court of the District of Columbia, the 28th day of January, 1867.

HENRY B. TYLER, plaintiff,
v.
JOHN D. DEFREES, defendant. } At law.—No. 3,501.

The President of the United States to the marshal for said district, greeting:

Summon the defendant in the above-entitled case to appear in said court on or before the first special term thereof occurring twenty days after service of this writ, and answer the declaration herewith served; and warn him that, on default of so doing, the plaintiff may proceed to judgment and execution at the trial term of said court next after
4 said service. And do you return this writ into the clerk's office immediately after service, so indorsed as to show the time and manner of executing it; and if you cannot serve it within six months—the day of its issuance, exclusive—then return it into said office for renewal.

Witness D. K. Cartter, chief justice of said court.

R. J. MEIGS, *Clerk.*

BRENT & M.

NOTE.—That the special terms of the court commence on the first Tuesday of every month except May, in which month they commence on the third Monday, and August, in which month there is no term of the court; and that the trial terms of the court commence on the first Tuesday of February, third Monday of May, and first Tuesday of November, when final judgments may be taken and execution awarded.

Marshal's return Jan'y 29, 1867.

"Served copy of sum'ns and declaration on def't.

"D. S. GOODING, *Marshal.*

"JANUABY 29*th*, 1867."

5 *Def't's plea.—Filed M'ch 2, '67.*

In the Sup. C., D. C., March 2nd, 1867.

DEFREES, def't, *ats.* TYLER, pl'ff. } At law.

The defendant says he is not guilty.

PHILLIPS, *for Def't.*

Joinder.—Fil'd 10 Sept., '67.

In the supreme court of the District of Columbia, the 9th day of September, 1867.

H. B. TYLER *vs.* JOHN D. DEFREES. } At law.—No. 3,501.

The plaintiff takes issue upon the defendant's plea.

BRENT & MERRICK,
Attorneys for Pl'ff.

Additional plea.—Filed (by leave of court) July 9, '68.

In the sup. c't, D. C.

TYLER *vs.* DEFREES. }

6 The defendant by Riddle & Phillips, his attorneys, comes and defends the wrong &c.; and for a further plea in this behalf the defendant begs leave of the court, here for this purpose first had and obtained according to the form of the statute &c., says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, the defendant, because he says that the said plaintiff did, to wit, on the 1st day of January, 1862, and continually thereafter until, to wit, the 17th day of April, 1865, act as a colonel in the marine corps of the navy of the rebels in arms against the government of the United States; and that the said plaintiff did hold an office of honor, trust, and profit in the United States prior to the 17th July, 1862, to wit, the office of major in the marine corps of the navy of the U. S., and did thereafter hold an office in the marine corps of the navy of the so-called Confederate States of America, to wit, the office of colonel in the marine corps of the navy of the so-called Confederate States of America; and because that
7 the said plaintiff did accept his said appointment as colonel since the date of the pretended ordinance of secession of the State of Virginia, and because the said plaintiff did take an oath of allegiance to or to support the constitution of the so-called Confederate States. And further, because the said plaintiff was the owner in the District of Columbia, on the 17th July, 1862, and had been for a long time prior thereto, to wit, for the period of ten years, owner of the property set forth in said declaration, and did thereafter, being owner as aforesaid, from the said 17th July, 1862, to the 17th day of April, 1865, continuously assist and give aid and comfort to the rebellion which was then waged against the government of the U. S. by the so-called Confederate States of America; and further, because the said plaintiff from, to wit, the said 1st day of January, 1862, and continuously thereafter until, to wit, the 17th

8 April, 1865, was within a State of the United States, to wit, the State of Virginia, and was engaged all the said time last aforesaid in armed rebellion against the United States, and did not within sixty days after public warning and proclamation duly given and made by the President of the United States, on the 25th day of July, 1862, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the U. S.; and further, because on the 13th November, 1862, the President of the U. S. issued the following order to the Att'y Gen. of the U. S:

[Here insert order.]

And on the 8th of January, 1863, the Attorney General issued the following instructions to district attorneys & marshals:

[Here insert instructions.]

And on the 11th of June, 1863, the marshal for the District of Columbia received the following written authority from the district attorney of the U. S. for the District of Columbia:

[Here insert order.]

9 Who, thereupon, in pursuance of the said authority last aforesaid, on the 31st day of June, 1863, seized all the right, title, interest, and estate of the said plaintiff of and into said property set out in said declaration, and gave written notice thereof to Caroline S. Mortimer, the person in possession of said premises. And on the 13th day of June, 1863, made written return of said seizure to the said district attorney. And on the 16th June, 1863, the said district attorney filed a libel of information in the supreme court of the District of Columbia, holding the United States district court for the District of Columbia, and thereupon certain other proceedings were had, as all of which will more fully appear by the following copy of record of said court:

[Here insert copy of all the papers in cause No. 34, dist. court.]

And on the 9th day of September, 1863, the marshal in pursuance of and in conformity to the said writ of venditioni exponas, and after
10 due notice as therein prescribed, sold the [the] said property to one John Van Riswick for the sum of $3,200. That the said Van Riswick received a good and sufficient conveyance from said marshal for the interest which he had bought under said writ and sale, and that the interest of said Van Riswick in said property, and its possession by several mesne conveyances, have become vested in said defendants, and this he, the said defendant, is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

RIDDLE & PHILLIPS,
Att'ys for Def't.

11 *Replication to amended special plea.—Filed July* 9, '68.

HENRY B. TYLER
vs.
JOHN D. DEFREES. } At law.—No. 3,501.

The plaintiff saith for amended replication to the plea this day filed that he ought not to be bound by anything in said plea alleged, because

as to so much of said plea as alleged a seizure of the property aforesaid and a sale thereof, the plaintiff saith that the said property was not seized and the same was not condemned and sold under the laws of the United States in manner and form as in said plea set forth, and this he prays may be enquired of by the country; and as to the residue of the matters set forth in said plea, the plaintiff saith that the President of the United States by virtue of the powers in him vested by the Constitution of the United States, did by his proclamation dated the 4th of
12 July, 1868, proclaim and declare unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion, excepting such person or persons as may be under presentment or indictment in any court of the United States having competent jurisdiction upon a charge of treason or any other felony, a full pardon and amnesty for the offence of treason against the United States or of adhering to their enemies during the late civil war, with restoration of all rights of property except as to slaves; and except also as to any property of which any person may have been legally divested by the laws of the United States. And the plaintiff further saith that he was not at the date of said proclamation or previously thereto under presentment or indictment in any court of the United States upon a charge of treason or any
13 other felony; and the plaintiff further saith that he is not claiming in this action any property in slaves or any property of which he has been legally divested by the laws of the United States.

R. J. BRENT,
R. T. MERRICK,
For Plaintiff.

In the supreme court of the D. C.

TYLER
v.
DEFREES.

The defendant joins issue as to so much of said replication as (relates) to the matters (whereof) the plaintiff has put himself upon the country; and as to the residue thereof, the defendant demurs and says that the same is bad in substance.

RIDDLE & PHILLIPS,
Atty's for Def't.

Margin: The pardon set forth in said replication does not prevent the defendant from pleading the statutory bar of the act of Congress of 17th July, 1862.

RIDDLE & PHILLIPS,
Att'ys for Def't.

14 *Proceedings before court.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court, commencing the third Monday of May, 1868.

MONDAY, *May*, 18, 1868.

By order of Mr. Justice Fisher, presiding, the court is opened by proclamation of the marshal.

THURSDAY, *July* 9, 1868.

Session resumed pursuant to adjournment, Justice Fisher presiding.

HENRY B. TYLER, pl'ff,
vs.
JOHN D. DEFREES, def't. } At law.—No. 3,501.

The defendant, by leave of the court, files an additional plea; and thereupon the plaintiff files the following motion in writing: "The above plaintiff moves the court here that the plea of the defend-
15 ant this day filed be not received, but be stricken out and taken from the files, because the same is a plea to the supposed disability to the plaintiff to maintain this suit, and the same cannot be pleaded after the filing of the plea of not guilty, heretofore filed." Which motion the court overrules, and the plaintiff, reserving an exception thereto, filed his replication to said additional plea; and to said replication the defendant rejoins, joining issue thereon. Whereupon comes a jury of good and lawful men of the District of Columbia, to wit, William R. Reed, Martin M. Potts, David M. Bull, William R. Clark, William F. Seymour, George T. Langley, A. M. Caldwell, Peter J. Collison, Henry Boswell, George L. Sheriff, Simeon Mead, and Henry B. Walker, who, being sworn to try the issues above joined, upon their oath say:

Verdict.

That the plaintiff, prior to the breaking out of the late rebellion of the southern States in the year 1861, was the owner, in fee simple, of the premises described in the declaration; and that he has
16 made no conveyance of said property, and continued owner of the same during said war. That, for ten years previous to said rebellion, and also at the time of its commencement, the said plaintiff was a major in the marine corps of the United States; and that he resigned his position as such officer, went to the southern States, and entered the marine corps of the navy of the southern confederacy; was an officer therein, of the rank of colonel, and was actively engaged as such in hostilities against the government of the United States, from the year 1861 until the close of the late war, in 1865. That the said plaintiff accepted his said appointment of colonel since the date of the pretended ordinance of secession of the State of Virginia, and that he took an oath of allegiance to, and to support the constitution of, the so-called Confederate States of America. That the President of the United
17 States issued his proclamation of the 25th of July, 1862, in conformity with the act of Congress of the 17th July, 1862. That on the 13th of November, 1862, the President of the United States issued the following order:

President's order.

"EXECUTIVE MANSION, *November* 13, 1862.

"Ordered by the President: That the Attorney General be charged with the superintendence and direction of all proceedings to be had under the act of Congress of the 17th July, 1862, entitled 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' in so far as may concern the seizure, prosecution, and condemnation of the estate, property, and effects of rebels and traitors, as mentioned and provided for in the fifth,

sixth, and seventh sections of the said act of Congress. And the Attorney General is authorized and required to give to the attorneys and marshals of the United States such instructions and directions as he may find needful and convenient, touching all such seizures, prosecutions, and condemnations. And moreover, to authorize all such
18 attorneys and marshals, whenever there may be reasonable ground to fear any forcible resistance to them in the discharge of their respective duties in this behalf, to call upon any military officer in command of the forces of the United States, to give to them such aid, protection, and support as may be necessary to enable them safely and efficiently to discharge their respective duties. And all such commanding officers are required promptly to obey such call, and to render the necessary services, as far as may be in their power consistently with their other duties.

"ABRAHAM LINCOLN.

"By the President:

"EDW. BATES,
"*Attorney General.*"

That on the 8th of January, 1863, the Attorney General issued the following instructions to the district attorneys and marshals:

Attorney Gen'l inst's.

"ATTORNEY GENERAL'S OFFICE, *January* 8, 1863.

"General instructions to district attorneys and marshals relative to proceedings under the acts of Congress for confiscation.

19 "The President of the United States has charged the Attorney General with the superintendence and direction of all proceedings to be had under the act of Congress of the 17th of July, 1862, and the act of August 6, 1861, commonly called the confiscation laws, and authorized and required him to give to the attorneys and marshals such instructions and directions as he may find needful and convenient touching all such seizures, proceedings, and condemnations. In the execution of that duty I find it necessary to give but a few preliminary instructions relative to the seizure of property with a view to condemnation under the law. The law requires the proceeding to begin with seizure. When once seized and properly reported to the district attorney, it will be proceeded against in court. Then each case becomes an action pending, and the laws themselves are the sufficient instruction to both the attorney and the marshal in all ordinary cases. If unforseen diffi-
20 culties arise in the progress of a cause, so as to embarrass the district attorney or marshal as to his mode of proceeding, he should report to this office, stating the precise facts, and asking instructions upon the point of his difficulty. With regard to the seizure of property, the following instructions are given:

"1. All seizures will be made by the marshal of the proper district under written authority, to be given him by the district attorney, specifying with reasonable certainty the property to be seized, and the owner whose right is sought to be confiscated.

"2. When the marshal has seized any property under such authority, he will, without any unnecessary delay, make a true return thereof, in writing, to the district attorney.

"3d. The district attorney shall keep in his office, fairly written in a book, a duplicate or exact copy of every such order of seizure made by

him and directed to the marshal; and the marshal shall keep
21 in his office, fairly written in a book, a duplicate or exact copy of every return of seizure which he shall make to the district attorney; and this as well for their own safety as for the information of the government and the court.

"4. The issuing of the order of seizure is trusted to the direction of the district attorney, and while he ought to be vigilant to execute the law, he ought to be careful to avoid hasty and improvident seizures. In every instance he ought to be satisfied that there is probable cause for the seizure, and that he has reasonable ground to believe that he can prove in court the facts necessary to warrant the condemnation; for otherwise, besides the injustice which may be done to individuals, the government will be put to great expense, and will be discredited by the frequent failure of its prosecutions. The district attorney must, necessarily, do this part of his duty upon his own judgment and
22 responsibility. He is on the spot, and has the means of knowledge, while this office cannot have the requisite information of the facts, nor govern the details of prosecution in the multitude of cases that will probably arise in all the districts of the nation.

"5. As to the manner of making the seizure, I can do little more now than suggest methods of convenience. Where the State law directs the method of seizure, it should be conformed to as nearly as may be, consistently with the objects of the acts of Congress. If the thing to be seized be personal property, it ought to be actually seized and safely kept; if real estate, the marshal ought to seize all the right, title, interest, and estate of the accused party, giving notice, in writing, of the seizure to the tenants in possession, if any; if stocks, or other intangible property, the marshal ought (if there be no specific method prescribed by the State law) to describe the property as plainly as he can in his return, and leave the court to determine the sufficiency of the seizure.

23 "6. I am credibly informed that in various parts of the country property has been seized by military officers, with a view to confiscation, under the acts of Congress. In all such cases, when the military officer in possession is willing to surrender the property to the civil authority, to be proceeded against according to law, the marshal shall receive the same, and make return thereof to the district attorney, as required in No. 2.

"7. After the seizure of the property, the district attorney will, with all convenient speed, proceed in the proper court for the condemnation of the property seized.

"EDWARD BATES,
"*Attorney General.*"

That on the 11th of June, 1863, the marshal for the District of Columbia received the following written authority from the district attorney of the United States for the District of Columbia:

District att'y's order to marshal.

"OFFICE U. S. DISTRICT ATTORNEY,
"*Washington, D. C.*, 11 *June*, 1863.

To the marshal of the District of Columbia:

24 In compliance with general instructions issued by the Attorney General, under act of July 17, 1862, entitled 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the

property of rebels, and for other purposes, I have to direct that yc seize the west half of lot numbered six, (6,) in square numbered four hundred and fifty, (455,) as the same is known and described on the ground-plats and plans of the city of Washington, and recorded in the land records of the District of Columbia, together with all the improvements, buildings, rights, privileges, appurtenances, and other heriditaments to the same belonging or in any wise appertaining, and all right, title, interest, and estate of Henry B. Tyler therein, as proceedings are to be instituted to secure the condemnation of the same to the use of the United States under the above-entitled act. You will report the seizure to me when the same shall have been made.

" EDWARD C. CARRINGTON,
" *U. S. Attorney.*

25 MONDAY MORNING.—Mr. Phillips: I see no objection to any arrangement in reference to the Tyler property, consistent with the seizure and the non-payment of rents by the occupants and lessees.

N. WILSON.

Marshal's notice to occupants.

UNITED STATES MARSHAL'S OFFICE,
Washington City, D. C., June 13, 1863.

To the occupants of the buildings and improvements on the west half of lot numbered six (6) in square numbered four hundred and fifty-five, (455:)

You will take notice that the property above described has been seized by me, by virtue of the confiscation act of July 17, 1862, to be held subject to the order of the United States district court for the District of Columbia and the district attorney. You are directed to pay no rent now due or hereafter to become due on account of occupancy of said premises to any other than an authorized agent of the United States.

Yours, &c. &c.,

WARD H. LAMON,
U. S. Marshal, D. C.

26 *Marshal's certf. of seizure.*

I do certify that I have made seizure of the within-desc and given notice to the tenants in possession, as within d June 13, 1863.

W. H. LAM[illegible],
U. S. Marshal, D. C.

That the said marshal in pursuance of the said authority last aforesaid went upon said property, and having with him said writ, pursuant to said order of the district attorney, dated 11 June, 1863, enquired who was in possession of the premises, and found that a lady named Caroline L. Mortimer was in possession, but paying no rent; and the said marshal then notified Mrs. Mortimer on said premises that he had seized the property of Henry B. Tyler, under the order of the district attorney aforesaid, and requested her, if possible, to convey notice of said seizure to said Tyler, which said notice was in writing and is made part hereof, and certified in writing the seizure to the United
27 States district attorney for the District of Columbia, made by him in manner as aforesaid, which is made part hereof; that the marshal

told said Mrs. Mortimer that he came there for the purpose of seizing said property; that the act of seizure was proclaiming to Mrs. Mortimer what is above found to have been told her, by opening the door of said premises, and by taking possession of said premises under said seizure, and there was no other seizure made than by the words and acts of said marshal as above found; that the marshal was in possession of the property under this alleged seizure, but did not remain personally there or turn Mrs. Mortimer out of possession; and further that the said tenant made no objection to the said notice from the marshal; that after the said acts, and on the 16th June, 1863, the district attorney of the United States for said district filed a libel of information in the supreme court of the District of Columbia sitting as the United
28 States district court for the District of Columbia; and thereupon certain other proceedings were had, as all which will more fully appear by the following copy of record of said court:

Copy of record of confiscation.—Libel.

To the judges of the supreme court of the District of Columbia, sitting as the United States district court for said district:

This is the libel of information of Edward C. Carrington, United States attorney for the District of Columbia, in behalf of the government of the United States against the west half of lot numbered six, (6,) in square numbered four hundred and fifty-five, (455,) as the same is known, marked, and designated on the ground-plats and plans of the city and county of Washington and District of Columbia, recorded in the land records of said district, together with all the improvements, buildings, rights, pivileges, appurtenances, and other hereditaments to the same belonging or in any wise appertaining, and against all persons lawfully intervening for their interest therein. And there-
29 upon the said Edward C. Carrington, United States attorney, as aforesaid, doth allege and articulately propound as follows:

I. That certain States forming a part of the territory and constituting a part of the government of the United States, and specifically enumerated by the President of the United States in his proclamation, duly issued, and bearing date the first day of July A. D., eighteen hundsed and sixty-two, are engaged in armed rebellion against the lawful authority of the United States.

II. That by the act of Congress of the United States, approved the eeventeenth day of July, in the year of our Lord one thousand eight hundted and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," provision was made for the seizure and confiscation of the property of persons engaged in armed rebellion against the lawful authority of the United States as therein set forth.

30 III. That the President of the United States did, on the twenty-fifth day of July, in the year of our Lord eighteen hundred and sixty-two, issue his proclamation warning all persons within the contemplation of the sixth section of the said act of Congress of July 17, A. D. 1862, to cease from participating in, aiding, countenancing, and abetting the existing rebellion against the government of the United States as provided for by said act.

IV. That Henry B. Tyler, on the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, was, and, previously thereto had been, the owner of real estate in the District of Columbia, described as follows: The west half of lot numbered six (6)

and square numbered four hundred and fifty-five, (455,) as the same is known, marked, and designated on the ground-plats and plans of the city and county of Washington, District of Columbia, and recorded in the land records of said district; together with all the improvements, buildings, rights, privileges, appurtenances, and other
31 hereditaments to the same belonging or in any wise appertaining.

V. That the said Henry B. Tyler subsequently to the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, held and exercised an office and agency of honor, trust, and profit under the government of the so-called Confederate States, and under one of the said several States of said confederacy, and under the laws thereof; and that the said Henry B. Tyler accepted the appointment and was elected to said office and agency after the date of the pretended ordinance of secession of said State, and did take an oath of allegiance to, and to support the constitution of, the so-called Confederate States.

VI. That the said Henry B. Tyler, owning property in the said District of Columbia as aforesaid, has, since the said seventeenth day of July, in the year of our Lord one thousand eight hundred and
32 sixty-two, assisted and given aid and comfort to the rebellion, and to those engaged in the rebellion against the lawful authority, and against the government of the United States; in this, that the said Henry B. Tyler did, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, and at various other times, between that date and the date of the filing of this libel of information, given aid and comfort to said rebellion by acting as a soldier and as an officer and as a non-commissioned officer in the army an navy of the so-called Confederate States, and by contributing money and property to the aid and encouragement of those engaged in the rebellion against the lawful authority of the United States, and to the government of the so-called Confederate States.

VII. That the said property herein described has been seized by the United States marshal for the District of Columbia, in compliance with instructions issued by the Attorney General to the district at-
33 torneys of the United States, and by virtue of the fifth section of the act approved on the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, and to seize and confiscate the property of rebels, and for other purposes."

VIII. That by reason of the premises the property herein described, and all the right, title, interest, and estate of the said Henry B. Tyler therein became and was forfeited to the United States, and ought to be condemned to their use.

Wherefore prayer is hereby made to your honor that process of monition may issue against the owner and owners of the said property herein described, and against all persons interested or claiming an interest therein, warning them at some early day to be therein named, to appear and answer this libel of information; and the owner of said property being absent and non-resident, prayer is further made for the
34 order of publication in the usual form, and for such further and other relief as to law and justice may appertain, and as this court is competent to give in the premises.

EDWARD C. CARRINGTON,
U. S. Attorney.

Filed June 16, 1863.

JUNE 16, 1863.

Let process issue as prayed.

D. K. CARTTER, *Ch'f Justice.*

Ent'd min., D. C., page 99.

Order for process.

Supreme court of the District of Columbia, sitting as the United States district court for said district.

UNITED STATES
vs.
THE WEST HALF OF LOT NUMBERED six in square numbered four hundred and fifty-five (455) in Washington city.

Whereas the west half of lot numbered six, (6,) in square numbered four hundred and fifty-five, (455,) as the same is known, marked, and designated on the ground-plats and plans of the city and county of
35 Washington and District of Columbia, recorded in the land records of said district, together with all the improvements, buildings, rights, privileges, appurtenances, and other heriditaments to the same belonging, or in any wise appertaining, and all the rights, title, and interest of Henry B. Tyler therein, has been seized by the marshal of the United States for the District of Columbia, by virtue of an act of Congress, approved on the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and whereas the United States attorney for the District of Columbia did, on the sixteenth day of June, A. D. 1863, file a libel of information in the court, praying the condemnation of said property and real estate under the act aforesaid, and that process of monition issue against the owner and owners of said property and real estate, and all persons interested or claiming an interest therein, warning them, at some
36 early day, to appear and answer said information: It is therefore, on this sixteenth day of June, in the year of our Lord eighteen hundred and sixty-three, ordered that notice be given to the owner and owners of said property and real estate, and all persons interested or claiming an interest therein, to appear and answer this information on the first Monday of August next, and show cause, if any they have, why said property and real estate, and the right, title, and interest therein of the said Henry B. Tyler should not be condemned and sold according to law; and that notice be given by posting a copy of this order upon the front door of the court-house of the District of Columbia, and by publication in the National Republican twice a week previous to said first Monday of August, the first publication to be on or before the first Monday of July next.

By order of the court.
Test:

R. J. MEIGS, *Clk.*

Ent'd min., D. C., page 99.

37 *Monition.*

DISTRICT OF COLUMBIA, *to wit:*

The President of the United States of America to the marshal of the District of Columbia, greeting:

Whereas a libel of information has been filed in the supreme court of the District of Columbia, holding a district court of the United States for said district, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and sixty-three, by Edward C. Carrington, attorney of the United States for said district, on behalf of the United States of America, against the west half of lot numbered six, (6,) in square numbered two [four] hundred and fifty-five, (455,) together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in any wise appertaining, and all the right, title, and interest of Henry B. Tyler therein, as the same is known, marked, and designated on the ground-plats and plans of the city of Washington and District of Columbia, recorded in
38 the land records of said district, for the reason's and causes in said libel of information mentioned, and praying the usual process of monition of the said court in that behalf to be made, and that all persons interested in the said west half of lot numbered six, in square numbered two [four] hundred and fifty-five, buildings, &c., as above described, may be cited in general and special to answer the premises; and all proceedings being had, that the said west half of lot numbered six, in square numbered two [four] hundred and fifty-five, improvements, buildings, &c., as already herein described, may, for the causes in said libel of information mentioned, be condemned as forfeited to the use of the United States: You are therefore hereby commanded to attach the said west half of lot numbered six, in square numbered two [four] hundred and fifty-five, buildings, improvements, &c., &c., and to detain the same in your custody until the further order of the court in the premises, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be con-
39 demned and sold pursuant to the prayer of the said libel of information, that they be and appear before the said court to be held in and for the District of Columbia, on the first Monday of August, 1863, then and there to interpose a claim for the same, and to make their allegations in that behalf. And of what you shall have done in the premises, do you then and there make return, together with this writ.

Witness David K. Cartter, chief justice of said court, at the city of Washington, in the District of Columbia, this sixteenth day of June, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the 87th.

R. J. MEIGS, *Clerk.*

E. C. CARRINGTON, *U. S. District Attorney.*

Printer's certf. of publication.

OFFICE OF THE NATIONAL REPUBLICAN,
Washington, July 20, 1863.

We hereby certify that the advertisement of which the annexed is a copy was published in the Daily National Republican, twice a week, until August 3, '63, commencing June 20, '63.

W. H. POPE,
For W. J. MURTAUGH & CO.

Filed July 29, 1863.

R. J. M., *Clk.*

40 *Condemnation.*

At a stated term of the district court of the United States of America for the District of Columbia, held at the United States court-room, in the city of Washington, on the twenty-ninth day of July, A. D. 1863.

THE UNITED STATES
vs.
THE RIGHT, TITLE, INTEREST, AND ESTATE OF Henry B. Tyler in and to the property described as follows, to wit: The west half of lot numbered six, (6,) in square numbered four hundred and fifty-five, (455,) as the same is known, marked, & designated on the ground-plats and plans of the city and county of Washington and District of Columbia, recorded in the land records of said district, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging, or in anywise appertaining.

After considering the papers and pleadings filed with the
41 above-entitled cause, and due deliberations in the premises, it is ordered, sentenced, and decreed that all the right, title, interest, and estate of the said Henry B. Tyler in and to the real estate aforesaid be forfeited and condemned to the United States for and during the life of the said Henry B. Tyler, and that all the right, title, interest, and estate of the said Henry B. Tyler in and to the said personal property be forfeited and condemned to the United States absolutely and forever. And that the marshal of the United States for the District of Columbia proceed to sell said interests at public auction for cash to the highest bidder, after having given ten days' notice of the time, place, and terms of sale by advertisement in one or more newspapers, printed and published in the city of Washington, District of Columbia. And that said marshal bring the proceeds of sale into the registry of this court to await the further order of the court. And that the said mar-
42 shal make a deed of conveyance of said right, title, interest, and estate in and to the said real estate to the purchaser thereof, to be approved by this court. And that the said marshal deliver said personal property to said purchaser immediately after said sale. And also, after said sale give said purchaser immediate possession of said real estate. And it is further ordered that the said marshal collect the rents, issues, and profits have accrued, which may hereafter accrue from said real estate from the date of his seizure, under and by virtue of these proceedings, up to the time of said sale, conveyance, and delivery, and pay the same into the registry of this court, to abide the further order of this court.

By order of the court.

Entered min., D. C., page 119.

Venditioni exponas.

The President of the United States to the marshal of the District of Columbia, greeting:

Whereas the supreme court of the District of Columbia, hold-
43 ing a district court of the United States for said district, in the case depending therein in the name of the United States, against

the west half of lot numbered six, in square numbered four hundred and fifty-five, as the same is known, marked, and designated on the ground-plats and plans of the city and county of Washington, and District of Columbia, recorded in land records of said district, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging, or in anywise appertaining, and against all persons lawfully intervening for their interests therein; ordered, sentenced, and decreed that all the right, title, interest, and estate of Henry B. Tyler in and to the real estate aforesaid, be forfeited and condemned to the United States, for and during the life of the said Henry B. Tyler; and that all the rights, title, interest, and estate of the said Henry B. Tyler in and to the personal property in said proceedings mentioned be forfeited and condemned to the United States ab-
44 solutely and forever; and that the marshal of said district proceed to sell said interests.

You are therefore hereby commanded, in conformity to said order, sentence, and decree, to sell said interests at public auction for cash, to the highest bidder, after having given ten days' notice of the time, place, and terms of sale, by advertisement in one or more newspapers printed and published in the city of Washington, in said District; also, to bring the proceeds of said sale into the registry of said court, to await its further order; also, to make a deed of conveyance of said right, title, interest, and estate in and to the said real estate, to the purchaser thereof, to be approved by the court; also, after said sale to give the purchaser thereof immediate possession of said real estate; also, to deliver to the purchaser of said personal property the same immediately after said sale; and finally, to collect the rents, issues, and profits which may have accrued, and which may hereafter accrue from said real estate from the date of your seizure thereof, under and by virtue of these
45 proceedings, up to the time of said sale, conveyance, and delivery, and pay the same into the registry of said court, to abide the further order thereof. Hereof fail not, and make due return into the office of the clerk of this court of this writ, so endorsed as to show when and how you have executed the same.

Witness David K. Cartter, chief justice of said court, at Washington city, the fourth day of August, 1863.

[SEAL.] R. J. MEIGS, *Clerk.*

Marshal's return.

Sold the within-described property this 9th day of Sept., 1863. See acc't of sale and expense inside.

W. H. LAMON, *Marshal.*

Marshal's acc. of sales.

1863. Sept. 9. Henry B. Tyler's property:

To sold west ½ lot 6 in sq. 455, to John Van Riswick		$3,200 00
Deduct expenses and charges:		
By district attorney's com's	$320 00	
" marshal's fees and com's	160 00	
" clerk's fees	7 45	
" advertisement	83 93	
		571 38
Balance deposited in the treasury		$2,628 62

True copy. Teste:

W. H. LAMON,
U. S. Marshal, D. C.

That on the 9th day of September, 1863, the marshal, in pursuance of, and in conformity to, the said writ of venditioni exponas, and after due notice, as therein prescribed, sold the said property to one John Van Riswick for the sum of $3,200. That the said Van Riswick received a good and sufficient conveyance from said marshal for the interest which he had bought under said writ and sale, and that the interest of said Van Riswick in said property and its possession by several mesne conveyances have become vested in said defendant. And we further find the special pardon of the plaintiff, made part hereof, and his acceptance thereof, made part hereof, as follows:

President's pardon.

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

Whereas Henry B. Tyler, of the State of Virginia, by taking part in the late rebellion against the government of the United States, has made himself liable to heavy pains and penalties; and whereas the circumstances of his case render him a proper object of executive clemency: Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant to the said Henry B. Tyler a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows: 1st. This pardon to be of no effect until the said Henry B. Tyler shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865. 2d. To be void and of no effect if the said Henry B. Tyler shall hereafter at any time acquire any property whatever in slaves, or make use of slave labor. 3d. That the said Henry B. Tyler first pay all costs which may have accrued in any proceeding instituted or pending against his person or property before the date of the acceptance of this warrant. 4th. That the said Henry B. Tyler shall not, by virtue of this warrant, claim any property or proceeds of any property that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States. 5th. That the said Henry B. Tyler shall notify the Secretary of State in writing that he has received and accepted the foregoing pardon.

In testimony whereof, I have hereunto signed my name, and caused the seal of the United States to be affixed. Done at the city of Washington, this tenth day of August, A. D. 1866, and of the independence of the United States the 91st.

ANDREW JOHNSON.

By the President:

HENRY STANBERY,
Acting Secretary of State.

United States of America, Department of State.

To all to whom these presents shall come, greeting:

I certify that H. B. Tyler, of the city of Washington and District of Columbia, has deposited in this department his original oath, bearing date the fifteenth day of June, 1865, being in the form prescribed by the President's proclamation of May 29, 1865.

In testimony whereof, I, William H. Seward, Secretary of State of

the United States, have hereunto subscribed my name, and caused the seal of the Department of State to be affixed. Done at the city of Washington, this fourteenth day of August, A. D. 1866, and of the independence of the United States of America the ninety-first.

[L. S.] WILLIAM H. SEWARD.

United States of America, Department of State.

To all to whom these presents shall come, greeting:

I certify that the document hereunto annexed is a true copy of the original on file in this department. In testimony whereof, I, William H. Seward, Secretary of State of the United States, have hereunto subscribed my name, and caused the seal of the Department of State
50 to be affixed. Done at the city of Washington, this fourteenth day of August, A. D. 1866, and of the independence of the United States of America the ninety-first.

WILLIAM H. SEWARD.

WASHINGTON, *August 14th*, 1866.

Honorable WILLIAM H. SEWARD, *Secretary of State.*

SIR: I have the honor to acknowledge the receipt of the President's warrant of pardon, bearing date August 10th, 1866, and hereby signify my acceptance of the same, with all the conditions therein specified.

I am, sir, your obedient servant,

H. B. TYLER.

We also find the amnesty proclamation of the President of Sept. 1867, and of the 4th of July, 1868, (made part hereof.) [Not on file. R. J. M., clerk.]

And if, upon the facts aforesaid found, the court shall be of opinion that the plaintiff is entitled to recover, we then find for the plaintiff and one cent damages; otherwise we find for the defendant.

51 And upon this verdict the plaintiff, by his said attorney, moves for judgment; whereupon the court orders that the said motion be heard in the general term in the first instance, as also the issue of law tendered in the defendant's rejoinder aforesaid.

Proceedings of gen. term.—Oct. term, 1868.

Proceedings before the supreme court of the District of Columbia in general term, commencing on the third Monday, 19th day, of October, 1868.

MONDAY, *October* 19, 1868.

Term commenced by proclamation by the marshal by order of the court. Present, Chief Justice Cartter, and Justices Olin, Fisher, and Wylie.

MONDAY, *October* 26, 1868.

Session resumed pursuant to adjournment. Present, Chief
52 Justice Cartter, Justices Olin, Fisher, and Wylie.

HENRY B. TYLER, pl'ff,
vs.
JOHN D. DEFREES, def't. } At law.—No. 3,501.

Argued by Mr. Brent for the plaintiff, and Mr. Phillips for defendant.

TUESDAY, *October* 27, 1868.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin, Fisher, and Wylie.

HENRY B. TYLER, pl'ff,
vs.
JOHN D. DEFREES, pl'ff. } At law.—No. 3,501.

Argument concluded; Riddle for plaintiff, Merrick for defendant.

SATURDAY, *October* 31, 1868.

53 Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin and Wylie. Absent, Justice Fisher.

HENRY B. TYLER, pl'ff,
vs.
JOHN D. DEFREES, def't. } At law.—No. 3,501.

And now come here the said parties by their respective attorneys aforesaid, and thereupon because it seems to the court that the defendant's demurrer aforesaid is well taken, it is therefore sustained; and all and singular the premises being seen and by the court here fully understood, and mature deliberation being thereupon had, it appears to the court that the defendant is not guilty as above complained against him. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff $ for the costs of his defense, and that he have execution thereof.

54 In the supreme court of the District of Columbia, the 6th day of November, 1868.

HENRY B. TYLER, pl'tff.,
vs.
JOHN D. DEFREES, def't. } At law.—No. 3,501.—In error.

Know all men by these presents, that we, Henry B. Tyler and Robert J. Brent, are bound unto the above-named John D. Defrees in the sum of three hundred , to be paid to the said John D. Defrees, his executors, or administrators. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 6th day of November, 1863.

Whereas the above-named Henry B. Tyler hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Henry B. Tyler shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

H. B. TYLER. [SEAL.]
R. J. BRENT. [SEAL.]
R. T. MERRICK. [SEAL.]

Sealed and delivered in presence of—

The foregoing bond is hereby approved this 12th day of Nov'r, A. D. 1868.

D. K. CARTTER, *J's*

Nahonsoki 2
Johnson 24 Flow

SUPREME COURT OF THE UNITED STATES.

HENRY B. TYLER,
vs.
JOHN D. DEFREES.

Brief of Plaintiff in Error.

This was an action of ejectment brought by the Plaintiff in Error, to recover the west half of lot 6 in square 455 in the City of Washington. The defendant claimed the property as purchaser at a sale made under the decree dated 29th July, 1863, confiscating the same.

The special verdict finds, that the Plaintiff was the owner in fee unless his title was divested by the confiscation proceedings found by the jury, and the judgment being against the Plaintiff, he brings this writ of error.

See special verdict, from page 6 to 17:

1. First, as to the seizure made by the marshal.

It will be seen that the first instruction of the Attorney General, required that the written order of the District Attorney should "specify with reasonable certainty the property to be seized and the owner whose right is sought to be confiscated;" and the 5th instruction requires, that in making the seizure, the marshall should conform to the State laws regulating seizure of real estate, and *seize all the right, title, &c. of the* accused party, giving notice in writing of the seizure to the tenants in possession, if any.

Record 7 and 8.

These requirements were ignored in this—

1st. That there was no appraisement made of the property as is usual and customary by the local law.—Evans' Prac., 480.

2d. The Marshall fails to return "that he made seizure of all the right, title " &c. of the party accused," but simply returns, that "he made seizure of the within described property and gave notice to the tenants in possession as within directed," and the notice prefixed only informs the occupants, that the property has been seized by virtue of the confiscation act.

Record, p. 9.

But conceding the regularity of the seizure under the instructions of the Attorney General, we object that there was no judicial seizure in this case, and no judicial evidence before the court, of any seizure.

Treating it as an Admiralty case, and in the words of the act making it " conform as nearly as possible to proceedings in Admiralty," it is wholly defective for want of a seizure under the *order of the Court.*

The *alleged seizure* was attempted to be proved on the trial by evidence dehors the confiscation record which contains no evidence whatever of this *jurisdictional* fact.

The libel of information in its 7th article was, that the property "has *been seized* by the Marshall in compliance with instructions, &c;" but as the libel is the inception of the *Judicial* proceeding it manifestly refers to some antecedent seizure not ordered by the court.

The special verdict shows, that the pretended seizure was made and certified to the District Attorney on the 13th June, 1863.—(Record 9.) While the libel was not filed until the 16th June, 1863.—Record 11.

But such an *averment* of seizure is *not seizure* or proof *of seizure*, and the court never saw, at any time, the evidence

of alleged seizure returned to the District Attorney's office, before the filing of the libel.

As if utterly *ignoring* the allegation of a previous seizure, the monition signed by the clerk and countersigned by the District Attorney on the 16th June, 1863, commands the Marshall to *attach* the west half of lot six in square 455, and give due notice to all persons to appear and show cause why, &c., on the 1st Monday of August, 1863.—Record 13.

But the Marshall failed to make any return of the fact of attachment or seizure—nor does he appear by the special verdict to have executed the monition further than by advertising the notice to appear.

"It is true, that in what is termed "the order for process," the clerk, on the same 16th June, 1863, recites that this property "had been seized by the Marshall." (Record 12,) but that, manifestly, was a clerical assumption, and in contradiction of the monition and order of same date to *attach* it.

There is, therefore, in this case, no Judicial seizure or evidence of seizure upon the Record of the court, and therefore no jurisdiction in the court over the *property condemned.*

This libel should not only have averred, that the seizure was made, but that it subsisted and remained in force at the filing of the libel, and this is a jurisdictional averment for the reasons stated by Judge Nelson in 4 Blatch., 102.

3. The confiscation in this case, was *coram non judice and void.*

Where the seizure is on land, the court proceeds as a Court of Common Law with a Jury.

2 Parsons' Adm., 219.
Gilpin, 235.
1 Paines, C. C. R.. 491.
The Sarah, 8 Wheat., 391.

In this last case the court said, "that any proceeding as a

Court of Admiralty, after the fact appeared that the seizure was on land, would be a proceeding without jurisdiction "

It will be observed, that the 7th section of the act of 17 July, 1862, (12 Stat. 590,) evidently regarding the fact, that *seizures* might be on land or water, declares that "the proceedings shall conform as *nearly as may be*, to proceedings in Admiralty or Revenue cases."

This requirement must be taken distribntively, so as to require Admiralty proceedings where the seizure is on water, and Common Law proceedings where the seizure is *on land.*

We will here adopt as part of our brief, a portion of the able brief of Messrs. Curtis and Cushing already now before the court, as follows:

I.

"The seventh section of the act of July 17, 1862, provides for and directs "*criminal prosecutions*" within the meaning of the sixth article of the Amendments of the Constitution of the United States.

Armstrong's Foundry, 6 Wal., 769.
The Palmyra, 12 Wheat., 1·
The Malek Adhel, 2 How , 91
Mrs. Alexander's Cotton, 2 Wal., 404.
Amy Warwick, 2 Black, 673.
2 Sprague's Decs.
Joint Resolution of July 17, 1862, (12 Stat., 589) and message of President relating thereto, Cong. Globe, Pt. 4, 2d Sess., 1861, 1862, p. 3438.

II.

The record in this case shows that the requirements of that article were not observed.

(1.) It does not appear where the alleged offence was

committed, or, consequently, that the proceedings were in the State and district where it was committed.

(2.) There was no trial by jury, and such trial neither was nor could be waived.

People *vs* Cancini, 7 Abbot's Pr. R., 271.
Hawkins P. C., vol. 2, c. 40, § 21, and c. 27, § 19.
4 Black. Com., 319.
Admiralty Rule 29.

III.

Proceedings under the seventh section of the act of July 17, 1862, had for their object to "deprive a citizen of his property," within the meaning of the fifth article of the Amendments of the Constitution; and the record in this case shows that "due process of law" required by that article was not used.

Murray *vs.* Land Company, 18 How., 272.
The Palmyra, 12 Wheat., 1.
The Malek Adhel, 2 How., 9.

IV.

The seventh section of the act of July 17, 1862, requires a person to be held to answer for "an infamous crime," within the meaning of the fifth article of the Amendments of the Constitution; and the record in this case show that the requirements of this article respecting such accusations were not observed.

Jones *vs.* Robbins, 8 Gray, 329.
Norris *vs.* Doniphan, 4 Met., (Ken.,) 385.

V.

Unless the crime for the punishment of which the fifth and sixth sections of the act subject to forfeiture all property of the offender, shall be held to be treason or felony, these sections of the act "impose excessive fines," within

the meaning of the eighth article of the Amendments of the Constitution; and if the crime be treason or felony the accused cannot be held to answer, save in conformity with the requirements of the fifth article of the Amendment of the Constitution.

VI.

These were not "proceedings in admiralty," and there could be no trial therein without a jury.

Union Insurance Company *vs.* United States, 6 Wal., 759.

Armstrong's Foundry, 6 Wal., 766.

VII.

Condemnation without trial was erroneous.

Admiralty Rule 29.

VIII.

This record shows that there was not substantial compliance with the admiralty rules made by this court.

Rules 22, 29.

United States *vs.* Cutter, 2 Curtis' C. C. R., and cases there cited.

IX

Seizure by the President, preliminary to the filling of process, does not appear by the record.

X.

Seizure by order of the court, so as to bring the property into its possession and enable it to act *in rem*, is essential to its jurisdiction, and no such order of seizure, and no action on any such order, appears.

Thacher *vs.* Powell, 6 Wheat, 119.

Jennings *vs.* Carson, 4 Cranch, 23

Rose *vs.* Himely, 4 Cranch, 277.

The Mary, 9 Cranch, 144.

The Commerce, 1 Black, 581.

Nelson *vs.* Leland, 22 How., 48.

XII.

It does not appear that the plaintiff in error had, or could have had, any notice."

We will add a few words on this point to the able brief above referred to.

District courts of the United States have two distinct jurisdictions, and each are as distinct as if vested in different courts, and when they act as at common law the jury trial is secured under the seventh amendment of the Constitution and the express acts of Congress.

1 Brightly's Digest, 230, sec, 11.
8 Wheat., 394.
2 Howard, ~~04~~ 624

The district court of the District of Columbia has the same precise and separate jurisdiction.

1 Brightly, 236, sec. 21.
2 Brightly, p. 1173, sec. 3.

The right to a jury trial in common law cases, such as this has been decided to be, is indispensable, and it affects the jurisdiction of the court in all proceedings at common law, even if they be *in rem*.

The 5th, 6th, and 7th amendments of the Constitution protect every citizen from confiscation of his property unless by a jury trial.

3 Peters, 446.
Milligan's case, 4 Wallace, 2.
8 Wheat., 394.

And see also on this point—
4 Hill, 104, 140, and 146.
2 Mass., 236.

The words "in due course of law" mean "after judgment."

4 Black's Com. 381, 2.
2 Mass., 236.
2 Kent. 12–13.

The same point was decided in—

6 Wallace, 769, 772, and 764.

This is not a mere irregularity, and the sale may be collaterally questioned on the ground of want of jurisdiction to decree the sale without a jury trial. The district court was exercising special jurisdiction under the statute.

17th July, 1862, secs. 6 and 7.
2 Brightly, 1235, secs. 29 and 30.

In such cases it is in the predicament of an inferior court, and all its proceedings are *coram non judice* if the requirements of law be not observed in any respect.

4 Peters, 466.
8 How., 536, 548, 566, 567.
1 Smith's Lead. Cases, 832–5.

In 4 Peters, 466, as here, the want of *due notice* appeared in the record.

8 Howard, 495, is full, and shows that whenever a title is founded on a record it raises a question of jurisdiction.

See also 8 How., 541 and 567.
And 8 Wheat., 108.

When exparte proceeding are *in rem* the statutory notice is necessary.

1 Smith's Lead Cases, 836--7, 844.

And any irregularity is fatal.

2 Wallace, 640.
14 Howard, 334.
5 Johns, 37.

7 Maryland R., 377.
16 Maryland R., 177, 206.
8 Maryland, 444.
18 Maryland, 364.
7 G. & J., 429.

In 9 Howard, 349, there was a violation of law in not having jury trial, and the whole doctrine is threin fully discussed.

By referrence to the confiscation proceedings, it appears that there was not only *no jury*, but the decree of sale was passed 29th July, 1863, prior to first Monday in August, on which last day the monition and attachment were returnable, so that the legal notice prescribed was ignored, and the decree rendered without either actual or constructive notice. Of course such a sale is not judicial, but void to all intents, and in whatever way it may be presented to a court as a muniment of title, as shown in all the above authorities.

The libel does not on its face, show that the Plaintiff in error had not within 60 days after public warning and proclamation by the President ceased to aid, &c., in the rebellion as required by the 6th section of the act of 17th July, 1862, (12 Stat. 590.) Record, p. 10.

Nor does the decree of condemnation find the essential fact, that the property belonged to a person engaged in the rebellion, &c., as required by the 7th section of same act.

Record, 14.

4. on the effects of the pardon, we present the following considerations;

Policy and humanity require as complete a restoration of civil rights as possible, without divesting vested rights.

Deming's Case, 10 Johns, 235.

The Executive has power to pardon.

7 Peters, 150.

A general amnesty may be noticed *ex-officio* without plea.
1 Baldwin, 91.

On such acts, see—
1 Levinz, 26.
Cro. Eliz., 125.

But as it could be brought before a court by a plea even in a criminal case, *a fortiori* in a civil suit.

These disabilities to sue are terminated at end of war.
Hunter vs. Fairfax, 7 Cranch.

Objections to personal ability are waived by plea of not guilty, and their plea to the merits admits capacity to sue.
4 Peters. 480.

Especially must all objections to the citizenship of plaintiff be pleaded in abatement.
1 Peters, 450, 498.

It therefore results, that the demurrer filed by the defendant, to our replication of pardon and amnesty, (p. 4 and 5,) should have been overruled and not sustained as it was by the court in p. 18.

BRENT & MERRICK,
For Plaintiff in Error.

APPENDIX.

We submit as part of this brief, the following extracts from an able and exhaustive brief of the Hon. Ch. M. Conrad of the New Orleans Bar with which we have been favored.

The VII amendment to the Constitution provides that "In suits at Common Law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved," &c. The Judiciary Act fully carries out this provision. It provides that "the trial of issues of fact, in the District Courts, in all causes, except *civil* causes of admiralty and maritime jurisdiction, shall be by jury."—Act 1789, Sec. 9.

In the case of Parson vs. Bedford, 3 Peters', 445, the Supreme Court explain what is meant by the words "suits at common law" in this provision of the constitution. "In a just sense" say the Court, "the amendment may well be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the particular form which they may assume to settle legal rights" See also 16 Peters' 451. Now it will not be pretended that this libel was either of admiralty or equity jurisdiction. In fact the libel is not addressed to either of these Courts. It is therefore a suit at common law, and consequently should have been tried by a jury. Even had the law directed any other mode of trial, it would have been unconstitutional; but the law contains no such direction. It says: "the proceedings shall conform as nearly as may be to proceedings in admiralty, or *revenue cases*," The prosecuting officer seems to have

viewed the words "admiralty or revenue," as if they were two words having the same meaning, and that proceedings in admiralty and revenue cases must be the same. But this is manifestly an error. The rule is well settled that the proceedings in revenue seizures differ according to the place where they are made—that if made on waters navigable from the sea the proceedings are on the admiralty side of the District Court, and according to the forms of the admiralty, but if made on land are brought on the common law side of the Court, and are conducted according to the forms of the common law. In the case of the Sarah, 8 Wheat., 391, the Court, Marshall C. J. being its organ, say: "In the trial of all cases of seizure on land the Court sits as a Court of common Law. In cases of seizures made on waters navigable by vessels of ten tons burden and upwards, the Court sits as a Court of Admiralty. In all cases at common law the trial must be by jury. In cases of admiralty, it has been settled in the cases of the Vengeance, the Sally, and the Betsey and Charlotte, that the trial is by the Court."

The practice has conformed to this decision. See the Margaret, 9 Wheat., 427--8; U. S. vs. Hayward, 2 Gall., 490; Kent's Com., 1, 375–6; (New Edition, 410, 411,). Thus stands the law on this subject. Unless, therefore, we suppose that Congress is ignorant of the Constitution, and of the decision of the Supreme Court in regard to it, we must presume that when that body declared that proceedings to enforce forfeiture should conform as nearly as might be to "admiralty *or* revenue cases," they meant that the proceedings should be according to the one or the other, as circumstances might require—that is to say, that in all cases of seizure on waters navigable by vessels of ten tons burden or upwards, the proceedings should be the same as in admiralty cases; and that in all cases of seizure on land they should be the same as in revenue seizures on land—that is, according to the common law.

This construction not only reconciles the Act in this respect with the Constitution, but avoids all departure from established usage. On the other hand what possible motive could prompt Congress to adopt the strange and anomalous proceeding that has been pursued in this case? in which civil and criminal forms are blended together; in which a man is tried and convicted of a crime by a judge, and real-estate is libeled, and condemned by admiralty process? Above all, why should Congress wish, even if they had the power, to deprive citizens of that inestimable privilege, which the greatest tyrants of England have never dared to invade, the trial by jury? "The trial by jury," says the Supreme Court in commenting on the 7th amendment to the Constitution, "is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such trial is, it is believed, incorporated into every State Constitution of the Union." 3 Peter's 445.

The next irregularity to which we shall call the attention of the Court is, that the libel does not allege that the property proceeded against had been seized by the President. The 5th section of the Act provides that "To secure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all property, money, stocks, credits and effects of persons hereinafter mentioned, &c., and the 7th section authorizes *proceedings* in rem to be instituted for the condemnation of this property, "after it shall have been seized."

It is clear that no proceedings can be taken, under these provisions, against any property which the President had not previously "caused to be seized." The power to determine what and whose property ought to be seized, was to say the least, one of an unusual character, and extremely liable to abuse. Under this power multitudes of people

might be dispossessed of their entire estate, without any legal process—without even an accusation against them. If such a power could safely be lodged anywhere, it would only be with the Chief Magistrate, whose elevated position might be supposed to place him above any temptation to abuse it. Congress therefore wisely confined this power to the President alone.

Now the libel in this case does not allege that the property libeled had been seized by order of the President: in fact the reverse is fairly inferable from its language. The District Attorney therein sets forth that the property had been seized by the United States Marshal for the District within which it is situated, "*under written authority given him by the said Attorney* (that is by himself,) *in compliance with instructions issued by the Attorney General of the United States to the District Attorney thereof.*"

Upon this averment we will remark:

1st. That the alleged instructions of the Attorney General upon which the proceedings were grounded, were not produced. This seems to us a fatal omission.

True it has been held that when the Head of a Department assumes to act in the name of the President his authority to do so will be presumed. Wilcox vs. Jackson, 13 Peter's 513; United States vs. Eliason, 16 Peter's 291, 302. But this doctrine, founded on the peculiar relations that exist between the President and his legal advisers, has never been applied to officers of an inferior grade.

When the latter assume to act under the authority of the President, whether directly or through the appropriate heads of departments, they are bound to produce their authority.

2d. Even supposing that the District Attorney *was* authorized to order the seizure, the *libel* should have averred that the seizure was made by *order of the President*; not

by that of the District Attorney. Even a private agent does not bind his principal, if instead of acting in the name of the latter he acts in his own name, a *fortiori*, when a public officer acts under the orders of his superior, his acts are deemed to be those of the latter, and should be so declared upon. This is the more necessary when, as in the present case, the act is one which the superior alone is authorized by law to perform. Even when a duty duly imposed by law on the President, is performed by the appropriate head of a department, it is only valid because, in the language of the Supreme Court, "it is in legal contemplation the act of the President," and no one would ever think of declaring upon such acts as the acts of the head of a department, *through* and not *by* whom they were done.

3d. From the statement of the District Attorney in regard to the instructions of the Attorney General, it is evident that these instructions did dot refer to the seizure of the property of any particular person but were general in their nature and authorizsd the various District Attorneys to determine what and whose property should be seized within their respective Districts.

We have seen that the act vests the power to decide this point in the President alone. Could he delegate it to another? We think not.

This is not the ordinary case of the President entrusting to subordinate officers, or agents, the *execution* of his orders.

Nor is it the case where acts which the President is authorized to do are performed by Heads of Departments under the orders, express or implied, of the former, and whose acts, in contemplation of law, are the acts of the President. Even if such a presumption attached to the acts of any other officer of lower grade, it would contradict the averment that the order was issued by the District Attorney, in virtue of general, (not special,) instructions is-

sued by the Attorney General. So that, in point of fact, the District Attorney and not the President, decided that this property should be seized. Congress might possibly have conferred this power on the District Attorney, if indeed they could confer it on anyone, but as they did not do so, and conferred it on the President alone, the latter could not transfer it to another. As well might he have delegated to them the power to pardon, or to refuse pardons, to the parties accused.

To show the strictness with which special laws, conferring powers on the President, are construed, we refer to the cases Gelston vs. Hoyt, 3 Wheat., 330, 333; Wilcox vs. Jackson, 13 Peters' 513.

The first of these cases was a suit for damages against a Marshal of the United States, for an unlawful seizure of a vessel. The defendant justified the seizure *under an order of the President*, issued in pursuance of an Act of Congress, which authorized the President to seize vessels for a violation of its provisions, "to employ for that purpose the land and naval forces."

The Court decided that the plea was insufficient, inasmuch as the Act on which the seizure was founded authorized him to employ in making it, "the land and naval forces," but said nothing about the Marshal.

The second case arose under an act of Congress which directed the President to reserve from sale or private entry certain lands therein described for an Indian Agency, and for military purposes. The lands were accordingly reserved by the Secretary of War, but were nevertheless "entered" and taken possession of by a party, and an action of ejectment was brought against him. The defence was, that the act authorizing the reservation had not been complied with, in as much as the reservation was not made by the President. The Court sustained the reservation,

but on the ground that "the President acts through the Heads of Departments in relation to subjects which appertain to their respective duties," and that as this reservation, whether for military purposes or as an Indian Agency, appertain to the War Department, his act in the matter "was in legal contemplation, the act of the President," consequently that this was a compliance with the terms of the act. See also, 16 Peters, 291 and 302.

The Court will observe that in the first of these cases, a strict and literal compliance with the terms of the law is required, and that in both cases the principle is distinctly recognized that the powers conferred on the President should be exercised by himself or some one deputed by *him*, and who acts as his *representative only*, not as his substitute. Suppose that in the first of the above cases the Marshal had contented himself with simply admitting that he had made the seizure and referring to the act which authorized it, without alleging that it had been made *by order of the President*, and that, in the second case the declaration had alleged that the land had been reserved by a clerk of the War Department, what would have been thought of such a claim in the one case and such a defence in the other? Yet that is precisely the present case, and how trivial and unimportant are the duties which devolved on the President in the above cases when compared with the enormous power we are now considering!

If we are correct in the position that the property proceeded against in this case was never seized by order of the President, the District Attorney had no right to institute proceedings against it.

This seizure was an indispensable preliminary to the proceedings *in rem;* the very foundation on which they rested. "In summary proceedings where a Court exercises an extraordinary power under a special statute prescribing its course," (says the Supreme Court in Thatcher

vs. Powell, 6 Wheat., 119,) " we think that course ought to be exactly observed and those facts especially which give jurisdiction ought to appear in order to show that its proceedings are *coram judice.*"

Now, it will not be denied that in these cases the proceedings are summary; that the Court therein exercised extraordinary powers under a special statute; and that, in that statute, the course to be pursued is plainly marked out. The first step in the proceedings is a seizure of the property sought to be condemned by order of the President, and it was clearly the duty of the District Attorney, before he instituted proceedings for its condemnation, to ascertain whether or not such seizure had been properly made; until then, all proceedings for its condemnation were *coram non judice.*

But even supposing that the suit was regularly instituted, every step of its progress was marked by irregularities.

3. The first error which we shall mention is in the form of the libel. It does not conclude " *contrary to the form of the statute of the United States in such case provided*" as required by the 22d of the rules prescribed by the Supreme Court. This omission is fatal. It would be so in an information or an indictment at Common Law. " When the offense" says Chitty (Criminal Law, 1, 290) " is created by statute the words against the form of the statute in such case made and provided are absolutely necessary; if they be omitted no judgment can be given against Defendant." See also, 13 East, 259; Hawkin's Pleas of the Crown, B 2, Ch. 25 § 116, p. 251; Hale's Pleas of the Crown, 172, 189, 192; 1 Salk, 370; 5 Mod. 307; Ld. Raym, 2, 1104; 1 Sand 138; An. 34; Bacon's Ab., verbo Indictment H; Cole on Information. p. 65; Barnwell & Cres, 3, 86; Archbold's Criminal Prac., 1, 93; Gallison, 1, 67; 8 Term Rep., Earl of Glenricarde vs. Stokes; 7 East. 516; English

Common Law Rep., 217; Lee vs. Clarke, East, 2, 333–5.

If this omission is not cured even by the verdict of a jury, *a fortiori*, it is not cured by an *ex parte* decree like that in the present case.

The property proceeded against was not *found* to belong to said Defendant or accused The seventh section only authorizes the condemnation of the property seized "if it shall be *found* to have belonged to a person engaged in rebellion, or who has given aid and comfort thereto." The libel alleges that the "said accused is and was on the 17th day of July, and previously thereto had been the owner" of the property seized in this case, and that accused had engaged in the rebellion and given aid and comfort thereto. But there is no finding in regard to these facts by the Court.

4. This seizure of the property, by order of the District Attorney, was the only one that was ever made. No seizure by order of the Court was ever made, and the property never was in possession of the Marshal *as an officer of the Court;* consequently it never was under the control of the Court, and the Court had no power to condemn it.

We now proceed to point out errors of a still graver character.

A slight examination of the proceedings will suffice, we think, to satisfy the Court that they are founded on a total misconception or the 5th, 6th, and 7th sections of the act of 1862. These sections authorize proceedings against the property of those persons only, who had, in one or other of the modes therein mentioned. taken part in the rebellion. It is clear, therefore, that to sustain the proceedings *in rem*, it was necessary to show that the owner of the property proceeded against had *taken part in the rebellion*.

The only legal mode of showing this fact was by trying and convicting him.

The District Attorney seems to have been fully aware of this fact, but he fell into a strange error in regard to the mode of trial and conviction. Instead of viewing the act as a whole, and considering those sections, that looks to the personal punishment of the accused, and those that provide for the seizure and confiscation of his estate, as all conducing to the same end, to wit: the punishment of those who had taken a prominent part in the rebellion, he sees in it two distinct enactments, each of them aiming at an entirely different purpose, and interprets each of these enactments as if the other were stricken out. Instead therefore of first proceeding against the accused under the 1st or the 2nd section of the act, and, in the event of his conviction, proceeding under the 7th section against his property, the District Attorney combines these two operations into one and the same suit, and joins an information *in personam* against the owner, with a libel *in rem* against the property. If his construction of the act be correct, the present proceedings must be based exclusively on the 5th and 7th sections, but where can he find in either of those sections any authority conferred on him to file an information against the owner, or on the Judge to try such an accusation. ?

These sections only authorize *proceedings in rem* against the property, but it will surely not be pretended that an information charging a party with treason and rebellion is a proceeding *in rem*, and the records of the Court of admiralty or in revenue cases would be ransacked in vain to furnish a precedent for a proceeding which seeks at the same time to try a man for an indictable offence, and to confiscate his property; and, by one and the same decree, to convict the one, and condemn the other.

If this mode of proceeding be correct, then every one who violates this act *may* be "twice tried for the same offence," once under the 1st or the 2d section with a view

to hang or imprison him, and once under the 5th, 6th and 7th sections to confiscate his property. Supposing this double trial to be legal, where was the necessity for it? Every one knows that where a law prescribes several punishments for the same offence, there need not be as many trials and convictions as there are punishments, but that one conviction authorizes the infliction of all the punishments. Suppose the accused had been regularly tried and convicted by a jury under the 2d section, would any one have imagined that it was necessary that he should be tried and convicted a second time under the 5th and 7th sections with a view to the condemnation of his property? Would not the record of the proceedings on the first trial be sufficient evidence, nay the only legal evidence of his guilt? On the other hand, suppose that he had been tried under the 2d section and acquitted, would not the verdict of acquittal have been a bar to any proceedings against his property? If it would, then a trial under that section is the proper mode of determining the guilt or innocence of the accused for all purposes. The fact that the proceedings *in rem* look to the punishment of the party only in his property, and not in his person, does not effect the question. The legality or illegality of the mode of trying a person for an offense does not depend on the nature of the punishment which is sought to be inflicted on him; what is not a legal trial for every description of punishment authorized by the act, is a legal trial for none.

But we will be told, if it be necessary to convict the accused before proceedings can be taken against his property, these last are wholly useless.

This is a mistake, they are necessary; 1st, in order to transfer the title to the estate from the party convicted to the Government.

The act does not contemplate that, on conviction of the accused, the title to his estate should, *ipso facto* vest in the

Government, as is the case at Common law. Coke's Inst., 391; a Black. 4, 380–382. On the contrary, the 7th section provides that it is only transferred by a decree of condemnation.

2. They were necessary to enable the Government to ascertain what property belonged to him. That these were the objects of the proceedings *in rem* appears by the very section which prescribes them. It expressly declares that these proceedings are to be taken in order "*to secure the condemnation and sale of the property seized.*" Nor is this all; it continues, "if said property *shall be found to have belonged* to a person engaged in rebellion, or who has given aid or comfort thereto the same shall be condemned as enemy's property, and shall become the property of the United States." No language could convey more clearly the idea that the object of the proceedings *in rem* was simply to ascertain the ownership of the property and of transferring it to the Government. If they had been intended as a means of ascertaining the guilt or innocence of the owner of the property, the form of expression would have been different. It would have been, "If the owner of said property shall be found to have engaged in rebellion," etc.

We think we have shown that the proceedings *in rem* were not intended as a means of trying the owner of the property. If, however, they were designed for that purpose, the act is clearly unconstitutional.

The Constitution contains the following provisions: "The trial of all crimes, except in cases of impeachment, shall be by jury."—Art. 3, Sec. 2, § 3.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," "nor be deprived of life, liberty or property, without due process of law," etc.—5th Amendment.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and

to be informed of the nature and cause of the accusation." —6th Amendment.

The principles embodied in these provisions were, therefor, already familiar to American minds and in practical operation in these colonies long before the Constitution was adopted; and if they were not originally inserted in that instrument, it was not because doubts were entertained of their correctness, but probably because they were considered as political axioms, the formal declaration of which would look like the solemn enunciations of self-evident truths.

They all breath the same spirit and look to the attainment of the same object, a jealousy of the power of the Government, and an anxious desire to protect the citizen against its possible abuse.

Their language is as perspicuous as it is peremptory: "The trial of all crimes, except, etc., shall be by jury." Consequently no inquiry into the guilt or innocence of a party charged with having committed a crime, and with a view to punish him, can legally be made in any other mode, or by any other authority, than by a jury, and no conviction by any other authority, or in other mode, would justify the infliction of punishment of any description.

The 6th amendment is a more emphatic repetition of the same idea, with additional provisions, intended to guard against the possibility of fraud or evasion. It is no longer a trial by jury, but a *speedy and public* trial by jury, "and not a *jury* only but an *impartial jury*," and moreover, one in which the accused shall be informed of the crime for which he is to be tried, and be confronted with the witnesses against him. Even this was not thought sufficient. Although at common law an information does not lie for any offence above the grade of a misdemeanor—Black's Com., 4 310; Chitty Crim. Law, 1, 166, Story No. 1778—and al-

though, in England, the power to employ this mode of accusation was lodged only in two high officers, the Attorney General and the Master of the Crown Office, and could only be exercised by them by permision of the Court, nevertheless, we are told, that "though lawful in itself this power to file informations became in the Court of Star Chamber an engine of tyranny in the hands of arbitrary Princes." Chitty Crim. Law, 1, 843--4.

One of the earliest fruits, therefore, of that revolution by which the liberties of England were for the first time firmly established, was the passage of a law (4 & 5 W. & M. ch. 18.) by which the power to file informations was taken from the crown office, and confined to the Attorney General where alone it is now lodged—Chitty 843, 844; Blacks, 4, 311.

Instructed by the experience of the Mother Country, the framers of our constitution went even farther than their ancestors had gone in their efforts to avoid the danger of arbitrary or interested accusations.

By the 5th Amendment they in effect prohibited altogether the filing *of informations* for crimes capital or otherwise infamous which words are probably used to designate all above the grade of misdemeanors.

A party charged with a crime above that grade is not bound even to answer the accusation unless it emanate from a Grand Jury.

An accusation in any other form he may utterly disregard.

The amendment adds "nor be deprived of life, liberty or property, without "DUE PROCESS OF LAW."

NOTE—These identical words "due proces of the law" are used in a law passed in 28th Edward III (ch. 3.) which provides, that "no man shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being

The history and meaning of the words "due process of law" are well known to the Court. They are synonyms with the words "Law of the Land" used in *magna charta*, and thence transferred to most, if not all, of our State Constitutions. Murray's Lessee vs. Hoboken Land & Impt. Co., 18 Howard, 276.

The object of the clause is to protect the citizen against the Government. If, therefore, it meant simply, that no man should be deprived of life, liberty, or property, except by virtue of some legal process, it would be illussory, for if ever the Government wished to perpetrate an act of tyranny or spoliation, nothing would be easier than to provide the necessary process for carrying the design into effect.

But the framers of the constitution did not rely on the infallibility of Congress, any more than on that of the other branches of the Government; the clause in question was designed as a check on them all. "It is manifest" says the Supreme Court, "that it was not left to the Legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make *any* process 'due process of law' by its mere will."—18 Howard, 276.

It is evident, that what shall constitute "due process of law" must depend on the nature of the case. What would be due process in one case, might not be so in another; above all, what would be "due process of law" in a civil case, could not be so in a criminal case.

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brought to answer by "*due process of the law.*" Hume says that this clause in the act was only a repetition of a clause to the same effect in magna charta. Hist. Eng. 2. 191.

Kent's Com. Lucture 24, vol. 2, 212. 213.

In regard to the former, entire discretion is left to Congress; e. g, it may prescribe any process it may see fit, for the sale of property, for taxes, or for duties unpaid, etc. But in regard to criminal proceedings, the case is different. The constitution here interposes, and declares: 1st, that no man shall ever be bound "*to answer*" an accusation of a crime either capital or infamous, unless it be preferred by a Grand Jury: 2nd, that no man shall be tried for *any* crime unless by an impartial jury, nor, unless he be informed of the crime, for which he is to be tried, and be confronted with the witnesses against him.

In order, therefore, to determine whether the proceedings by which the plaintiff was deprived of his property, were, or were not, "due process of law," we must first ascertain whether they were of a civil or a criminal nature. Judicial proceedings take their character from the law on which they are founded, or which they are designed to carry into effect. If that law be of a civil nature, designed for the protection, or the enforcement of some merely personal right, the proceedings should be such as the law has prescribed for that purpose. If on the other hand the law be a penal one; if its object be the punishment of crime, it can only be carried into effect by a criminal prosecution in the mode prescribed by the Constitution. The present case, as we have already stated, is founded on the Act of 17th July, 1862, entitled "an Act to suppress insurrection, to punish treason and rebellion, &c." The character of this act is proclaimed in its very title; its provisions are in harmony with itstitle. They are throughout punitive, and highly penal; they punish with death the crime of treason, hitherto punishable by imprisonment only; they create a new crime, that of rebellion, and punish it with imprisonment or fine, or with both, at the discretion of the Court, and, to all these penalties superadd those of confiscation

and of civil disability, heretofore unknown to our penal code. No reasonable man can doubt, no condid man will deny, that this is a penal statute designed to punish treason and rebellion. If such be the fact, every proceeding having for its object to inflict that punishment, is in effect, and should be in form, a criminal prosecution. The proceedings in the present case fulfill none of the requirements of the Constitution for a criminal prosecution in a crime of this magnitude. The accusation is preferred, not by the indictment of the Grand Jury, but by a libel of information, filed by the District Attorney: the accused was not "informed" of his accusation, unless an advertisement in a newspaper be considered such information. Finally, he was not confronted with the witnesses against him, but was tried in his absence, and the trial was by the Judge, not by a jury. If it be said that this is not a criminal prosecution, because it is in the form of a civil process, we answer, 1st, that this is precisely what we complain of, and that the nature of a proceeding does not depend on its form, but on the contrary, its form on its nature.

The conclusion is therefore inevitable, that the present case involved a criminal prosecution disguised under the forms of a civil process. Consequently that this was not "due process of law" in the sense of the Constitution.

We will add, that so much importance is attached in England, to jury trial, where forfeiture is the consequence of conviction, that conviction, even of capital offences, by any other mode of trial, as for instance, by the Lord Admiral, or by a court martial, did not work a forfeiture of lands. Coke's Inst. 391; Blacks. 4, 382.

How does defendant seek to escape from these unanserable arguments?

He says. 1st. That property may be confiscated for crime, by proceedings *in rem*, without conviction of the owner.

2. That property confiscated under the act of July 17th, 1862, is confiscated, not for crime, but as enemy's property.

Both these propositions are incorrect. In support of the 1st, the defendant refers to the decisions of the Supreme Court in various cases of maritime seizure, for breaches of navigation laws, beginning with the Vengeance, 3 Dallas, 297; Sally, 2 Cranch, 406; the schooner Betsy, 4 Cranch, 443; the Samuel, 1 Wheat., 9; the Octavia, 1 Wheat., 20; the Sarah, 8 Wheat., 391; the Palmyra, 12 Wheat., 1; and others of more recent date, in which it was held that the prohibition contained in the 5th Amendment to the Constitution. did not apply to confiscations by proceedings *in rem*, for violation of the laws of *impost, navigation, and trade.*

A very brief examination of the principles on which these decisions are founded, will suffice to show that they do not sustain the proposition of defendant.

Proceedings *in rem* have, from time immemorial, been employed in Courts of Admiralty, as means of enforcing a *jus in re*, that is, a *claim* or right, (such as a privilege, or lien, or an hypothecation,) in *the specific thing proceeded against.* At a later period it was adopted in England for enforcing the forfeiture of vessels, or merchandise. for breaches of revenue or navigation laws; but, of course, always confined to property that was *directly connected with* the alleged violation of law, either as the *subject* of it, or as the *means* with which it was committed. This practice existed both in the mother country and in the colonies when the constitution was adopted, and the Supreme Court, in the cases above referred to, decided that the prohibition contained in the 5th amendment to the Constitution did not apply to this class of cases. But why did it not apply to them? For two reasons: 1st, because they *were not* of a criminal nature. 2d, because the words "due process of

law" in that amendment, must be understood with reference to the laws in force at the time it was adopted; and as the confiscation of property by proceedings *in rem* against it for violations of laws of inpost, navigation and trade, *was* a process in use at that time, it was included in the words "due process of law."

The Palmyra, 12 Wheat., 1, one of the cases referred to by defendant, illustrates the principles on which these decisions are founded. This vessel was libeled for the violation of a special statute which declared that any vessel violating its provisions should be forfeited, but affixed no *personal* penalty to the offense. The defense set up was a want of a previous conviction of her owner. She was condemned on the grounds: 1st, that the law created no crime of which the owner *could* be convicted: 2d, that "This doctrine, had never (in England,) been applied to seizures or forfeitures created by statute *in rem, cognizable* on the revenue side of the Exchequer." That, in these cases "*the thing is primarily considered as the offender*, or rather the offense is primarliy attached to the thing." "Many cases exist where the forfeiture is solely *in rem*, there is no penalty *in personam*," etc. The Court adds however, that "if the object was presented *at common law* it must prevail."

Now, in the present case the law *does* impose a personal penalty on the owner. There *is* a crime, of which he can be convicted and he is charged with that crime, and the law expressly declares, *that the property connot be condemned, unless that crime shall have been committed by the owner.* 2d. In the present case the objection of a want of conviction of the crime, *is* presented in a case at common law. But the point to which the attention of the Court, is particularly called, is the care with which the right to confiscate property, by proceedings *in rem*, is confined to cases "*on the revenue side of the Exchequer*" in which "*the thing* is considered as primarily the offender." In the present case it is not pre-

tended that the houses and lots seized, have committed the offence, for which their forfeiture is demanded, or have been in any manner instrumental, in, or connected with, said offence. On the contrary, the owner thereof, is alone charged with said offence. It is evident therefore that these decisions afford no countenance whatever, to the novel doctrine that Congress may authorize the confiscation of property for crime without a previous conviction of the owner, by proceeding against the property itself.

Chancellor Kent, in commenting on these decisions, says "it may now be considered as the settled law of this country, that all seizures under laws of impost, navigation, and trade, if made upon tide waters, navigable from the sea, are *civil cases* of admiralty jurisdiction." So far therefore, from supposing that these decisions afford any ground for extending this mode of proceeding to any other class of cases than those of "impost, navigation, and trade;" he regrets that the Supreme Court should have gone as far as they had in sustaining them, and doubts the correctness of those decisions, which permit a resort to this mode of proceeding in seizures, even of this class, which were not made on *navigable waters*, inasmuch as, in England, such seizures, when made on land, were cognizable only in the Court of Exchequer, where the trial of all facts is by jury.—Comment., *vol.* 1, 375.

He concludes his remarks on this subject by the following reflections that are singularly apposite to the present case. "These proceedings for the forfeiture of large and valuable portions of property under revenue and navigation laws, are highly penal in their consequences, and the Government and its officers are always parties, and deeply concerned in the conviction and forfeiture; and if, by act of Congress, or judicial construction, the prosecution can be turned over to the admiralty side of the District Court, at being neither a criminal prosecution, nor a civil suit at

Common Law; the trial of a cause is transferred from a jury of the country to the breast of a single judge."—ibid. 1, 376.

We think we have succeeded in showing that the first ground on which these proceedings are sought to be sustained, is untenable. The second is equally so.

Before we discuss this point, however, we beg leave to ask a question. If it be true that property confiscated under the act of 1862, is confiscated on the ground that it is the property of an enemy, why in the present case was it not alleged to be the property of an enemy? Why was not its condemnation asked for, and the decree of condemnation based on that ground? There is not a word in all the proceedings looking to the condemnation of the property as that of an enemy, on the contrary, it is demanded on the ground that the owner has committed acts of treason and rebellion, crimes which we shall presently see, cannot be committed by an enemy. If then, it be true that the property can only be condemned on the ground that it is enemy's property, the decree, for that reason alone, if for no other, would be manifestly void. But supposing the sentence of condemnation to have been based on the ground that the property belonged to an enemy, have Congress declared, or could Congress declare, the property of a citizen to be that of an enemy?

The word enemy in its legal sense has a very different meaning from that in which it is ordinarily used. It has no reference whatever to the feelings or conduct of a person, but simply to his nationality. It means simply a person belonging to a foreign nation with which our own is at war. Every such person, even though he take no part in the war, is an enemy. On the other hand, no citizen, however inimical his feelings or his conduct towards his own country may be, can claim the immunities or incur the liabilties of an enemy. The word is therefore synonimous

with *alien enemy*, and this is the sense in which it is used by all legal writers. "By enemies," says Blackstone, "are here understood the subjects of foreign powers, with which our own is at war." "A rebel is not an enemy."—Commentaries, 4, 83; see also Vattel, ch. 5, 169; Bouvier's Dictionary, verbo, "*enemy*;" Mrs. Alexander's Cotton, 2 Wallace, 404. Such is the sense in which it is used in our own Constitution —Sec. 3, Art. 3.

To call a rebel an enemy, therefore, would be a contradiction in terms.

The act of 1862 is chargeable with no such contradiction. The whole argument for the contrary rests upon a single ambiguous expression in the 7th section; to wit: that which declares that the property shall be condemned "as enemy's property."

The defendant contends that the words "as enemy's property," here means, "because it is enemy's property," or "on the ground that it is enemy's property;" but how could that be, when previous sections of the act had declared the very parties whose property is thus to be condemned, to be "*traitors*" and "*rebels*," and punishes them as such? How can that be, when this very section authorizes the condemnation of the property of those alone, "who had engaged in the rebellion?" It is evident that the property is confiscated because it belongs to traitors and rebels, and not because it belongs to alien enemies. When therefore, the act declares that it shall be condemned as "enemies' property," it surely does not mean that it shall be condemned *because* it belongs to enemies. That would be equivalent to a declaration that the property of rebels is the property of alien enemies, which we have seen would be a contradiction in terms. It means, simply that the property shall be condemned *as if it was enemy's property*, or, *in the same manner as if it was enemy's property.*

If Congress had viewed the parties, whose property was to be condemned as *alien enemies*, the clause would have been useless, for there could be no necessity for declaring that the property of enemies should be condemned as enemies' property. It was precisely because they *did not* consider it as the property of *alien enemies*, that it was deemed necessary to provide that it should be condemned in the same manner, i. e., with the same forms as if it was.

Thus interpreted, the act is consistent with itself, and in this particular, with the Constitution; whereas the defendant admits that his own interpretation of these words is so utterly irreconcilable with the previous sections of the act, that to avoid contradiction between them, he is compelled to cut the act in two, and make two separare laws of it. Nor is this all. If this construction were correct, the act would conflict with the clause in Sec. 3, Art. 3, of the Constitution, which limits the power to confiscate property for treason, to the life of the offender, for this restriction does not, of course, apply to enemy's property, lawfully captured in war.

The crime of treason is the only one in regard to which the Constitution has prescribed limits to the power of Congress. The reason for this *limitation* is obvious. The framers of that instrument knew full well that prosecutions for treason had ever been the favorite instrument of tyrants and political factions, as they enabled them to gratify at once their vengeance and their cupidity. See the eloquet remarks of Judge Story, vol. 3, sec. 1295.

The provisions of our Constitution were chiefly borrowed from the celebrated act of 25 Edward III, and that of 7 Anne, ch. 22d, which last abolished in England forfeiture for treason beyond the life of the offender. But what are these restrictions worth, if Congress, the very branch of

the Government on which they are imposed, can evade them by calling a *citizen* an *enemy*, and his property, enemy's property?

No where is any authority conferred on that body to deprive a native of that citizenship which is his birthright. The Constitution authorizes Congress to convert *aliens* into *citizens*, but not to convert *citizens* into *aliens*, and still less, *alien enemies*. So long as a native of this country continues to reside within its limits, his allegiance is due to its Government, and allegiance and protection are inseparably connected.—1 Blackstone, 83; Kent, I, 47.

Congress can no more deprive a citizen of the protection which the Constitution affords, than it can absolve him from the duties it imposes. Still less can it, in the same act, deal with him as a citizen and as an alien enemy;—hang, or imprison him in one character, and confiscate his property in the other. The Constitution having declared what acts shall constitute the crime of treason, and prescribed its punishment, whoever commits those acts commits treason, and Congress cannot, by affixing to them another name, exceed the limits which the Constitution has prescribed for its punishment. If they could, this provision, and all others designed to protect life, liberty, and property, would become nugatory. They would become practically inoperative whenever they were most needed, for it is precisely in periods of discord and dissention, when violence usurps the place of law, and vengeance arrays herself in the robes of Justice, that these provisions are necessary to protect the weak against the strong, the few against the many.

The decisions of the Supreme Court, condemning vessels and their cargoes, captured during the late war, as enemies' property, have been referred to in support of this position. We need not remind the Court, that there is no analogy

between those cases and the present one. The forfeiture of enemy's property captured at sea rests on different principles from confiscation under a municipal statute. The former is governed by a peculiar code. The authority to make those captures is not derived from, nor is the mode of proceeding in regard to them regulated by statutory law, but from *jus belli*, or the laws and usage sof nations in a state of war. This law is the same in all civilized nations, and can be abrogated or modified by none; this law has from time immemorial recognized the right of one belligerent nation to capture at sea the property of its adversary, and on certain conditions to condemn and confiscate it. When therefore the Supreme Court, in the cases referred to, speak of property so captured, as enemy's property, they use that term in the sense in which it is used in the law of prize, and in reference to the cases under consideration. The Court seems indeed to have sought to guard against being misunderstood on this point. "In defining the meaning of the term 'enemy's property,' say the Court, "we will be led into error if we look to Fleta and Lord Coke for the definition of the word "enemy." It is a technical phrase peculiar to *prize Courts* and depends upon principles of public policy as distinguished from Common Law. "Again, whether property be liable to capture as enemies' property, does not in any degree depend on the presumed allegiance of the owner, (as it does at Common law) it is the illegal traffic that stamps it as enemy's property. It is of no consequence, whether it belongs to an ally or a citizen." 8, Cranch, 384.

"The owner *pro hac vice* is an enemy." Wash, C. C. R., 183.

These doctrines are entirely inapplicable to a case where real estate is sought to be condemned under a municipal statute, on the ground that the owner "had engaged in rebellion."

The question, how far the relations of citizens of the insurgent States towards the Government of the United States were affected by the attempted secession of those States from the Union, and by the war between them and the United States, was presented in the case of Shortridge vs. Macon, recently decided by the Circuit Court of the United States, sitting in the District of North Carolina.

The Plaintiff, a citizen of Pennsylvania, sued the Defendant, a citizen of North Carolina, on a promissory note. The defense set up was, payment made to the agents of the so called Confederate States, in virtue of an act of their Congress, which directed that all debts due by citizens of the Confederate States to those of the United States, should be paid to the authorized agents of the former. The question was the validity of this payment, and that depended on another, viz: did the citizens of North Carolina and Pennsylvania, become alien enemies to each other? The Court, (Chase C. J. being its organ,) decided they did not. They say "on no occasion, and by no act, have the United States renounced their Constitutional jurisdiction over the whole territory, or over all the citizens of the Republic, or conceded to citizens in arms against their country, the character of alien enemies, etc."

The decision of the Supreme Court in the prize cases above referred to, having been referred to by defendant in support of his position, the Court in reply to this argument say:

"In the prize cases, the Supreme Court simply asserted the right of the United States to treat the insurgents as belligerents, and to claim from foreign nations the performance of neutral duties, *under the penalties of international law*. The decision recognizes also the fact of the exercise and concession of belligerent rights, and affirmed as a necessary consequence, the proposition that, during the war, all the inhabitants of the country, controlled by the rebel-

lion, and all the inhabitants of the country, loyal to the Union, were enemies reciprocally of each other. *But there is nothing in the opinion that gives countenance to the doctrine which counsel endeavor to deduce from it, that the insurgent States by the act of rebellion and by levying war against the nation, became foreign States and their inhabitants alien enemies.*

The last, but by no means the least important, in the long list of irregularities, which mark these proceedings, is the judgment of the Court, by which the property is, in effect, declared *forfeited absolutely*, and not merely *during the life of the offending party:* thus flying right in the face, not only of Sec. 3, Art 3, of the Constitution, but of the joint resolution, passed simultaneously with the act, and which may therefore be considered as part thereof, and which was designed to prevent any such conflict. This resolution expressly declares that "*no punishment, or proceeding under said act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life;*" and we have the formal declaration of the President, in his message, communicating to Congress his approval of the bill, that without this resolution the bill would not have been approved. The language of this resolution is so explicit that no comment could make it more so, and we can only explain the decree by supposing that it was overlooked by the Court.

IN THE SUPREME COURT

UNITED STATES.

HENRY B. TYLER, Plaintiff,

vs.

JNO. D. DEFREES, Defendant.

SUPREME COURT UNITED STATES.

HENRY B. TYLER, Plaintiff,

vs.

JNO D. DEFREES, Defendant.

[This is a writ of error brought by the plaintiff to reverse the judgment of the Supreme Court of the District of Columbia.]

DEFENDANT'S BRIEF.

It was an action of ejectment brought by Tyler against Defrees, and came before said Court on a special verdict in which are found certain proceedings of confiscation of the property in question, purchase of it by defendant, and pardon of the plaintiff.

The plaintiff relies on certain alleged informalities in the confiscation proceedings in the District Court—such as decree for sale before return day of motion, and failure of trial by jury, together with his pardon from the Executive, to which the defendant answers that no matter howsoever erroneous the proceedings in the District Court, yet, it having jurisdiction by a seizure of the property confiscated, the validity of the judicial sale cannot be enquired into in this collateral action, and that his pardon or amnesty proclamation of the President does not affect the rights of third persons, but relieves the recipient of clemency from further responsibility to the *United States* alone.

1st. Had the District Court jurisdiction in the confiscation of the property in question?

We shall contend, both under the statute of the 17th July, 1862, and by the general law of proceedings *in rem.*, that the Court has jurisdiction the moment of seizure and institution of proceedings, *in rem.*

The 5th section of the confiscation act declares: "To ure the speedy termination of the present rebellion, it

shall be the duty of the President to cause seizure of all the estate," &c.

And in the 7th section: "To secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be available for the purpose aforesaid, proceedings, *in rem.*, shall be instituted in the name of the United States, in any District Court thereof, or in the United States District Court for the District of Columbia, within which the property above described may be found."

Here is the legislative declaration of what shall give jurisdiction to a court for the purposes of condemnation and sale. Seizure, and the institution of proceedings—a libel, according to the form of the admiralty—both of which are found by the special verdict.

But, independently to any statutory regulation, in all proceedings, *in rem.*, a court of admiralty, whether as a prize or instance court, has jurisdiction and absolute control over the thing as soon as seized and libelled.—*Jennings vs. Carson*, 4 *Cranch*, 23 *and* 24.

The District Court does not derive its jurisdiction from any possession, actual or supposed, of its officers, but from the act and place of the seizure for the forfeiture; and if it at once acquires jurisdiction, it is not avoided by any subsequent irregularity.—*Sch. Bolina and Cargo*, 1 *Gallis*, 81, 83; 2 *Parsons on Mercantile Law*, 535.

In a case of seizure on land, it was held nothing more was necessary to give jurisdiction in cases of this nature, than that seizure should be made within the District.—*Keene vs. U. S.*, 5 *Cranch*, 304.

And in the case of the Sarah, where the Supreme Court of the United States held for the first time that seizures made on land were cases at common law and triable by jury, yet they held in that case that a libel stating the fact of seizure on land would give jurisdiction.—*The Sarah*, 8 *Wheaton*, 391.

In order to institute and perfect proceedings *in rem.*, it is necessary that the thing should be actually and constructively within the reach of the court. It is actually wi

its possession, when it is submitted to the process of the court; it is constructively so when, by a seizure, it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem.*—*The Brig Ann*, 9 *Cranch*, 289, 291; *Conkling's Admiralty*, 253, 489, 490, 592.

The acts of seizure by the Marshal, in this case, were all that could be done. With his process he entered the premises, took possession of the same symbolically by taking hold of the door, proclaiming seizure on behalf of the United States, notified tenant in possession to pay no more rent to former owner, left her in possession under the United States, to which she made no objection, and requested her to notify former owner of the seizure, if it was in her power.—17 *Law Reporter*, 497; 1 *Sprague*; 10 *Wheaton*, 312.

2nd. The court having had jurisdiction over *the thing*, can such irregularities as failure to grant a trial by jury, or final decree before return day of monition, be relied upon in this collateral action?

It is a well-settled principle of law that the decree or judgment of a court which has jurisdiction of the person and subject-matter, is binding until reversed, and cannot be collaterally attacked. The Court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until set aside by the proper appellate tribunal. And though the judgment or decree may be reversed, yet, all the rights acquired at a judicial sale, while the decree or judgment was in full force, and which they authorized, will be protected. It is sufficient for the buyer to know that the Court had jurisdiction and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale. With the errors of the Court he has no concern. These principles have so often received the sanction of this Court that it would not have been deemed necessary again to re-affirm them had not the extent of the doctrine been questioned at the bar."—(*Mr. Justice Davis' Opinion:*) *Gray vs. Brignadello*, 1 *Wall*, 634.

In the case of the *United States, vs. Nourse*, 9 *Peters*, 8, Chief Justice Marshall says, (p. 28:)

"It is a rule to which no exception is recollected, that the judgment of a Court of competent jurisdiction while unreversed concludes the subject-matter as between the said parties. They cannot again bring it into litigation."

On p. 30, he says:

"Aware of the difficulty of maintaining an action on a claim on which a Court of competent jurisdiction has passed a judgment, still in force, the Attorney General questions the jurisdiction of the District Court, and rests his argument for the reversal of the judgment of the Circuit Court chiefly on this point. (This position the Chief Justice controverts and annihilates.)

In the case of *Voorhees vs. Bank of the United States*, 10 *Peters*, 449, Baldwin, J., delivered the opinion of the Court. On p. 472, he says:

"There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication, that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged.

"It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the Court, he must move to set them aside for irregularity; or, if there is any defect in the form or manner in which he is sued, he may assign those defects specially, and the Court can decide only on the right of the parties to the subject-matter of controversy; the judgment is conclusive, unless it appears on the record, i

the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law; all defects in setting out a title, or in the evidence to prove it, are cured, as well as all irregularities which may have preceded the judgment.

"So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be more reasonable than that the person who complains of an injury done him, should avail himself of his legal rights in a reasonable time, or that that time should be limited by law.

"This has wisely been done by acts of limitation on writs of error and appeals, if that time elapses. Common justice requires that what a defendant cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion."

In *Blaine vs. The Charles Carter*, a ship had been sold under executions issued within ten days after judgment, contrary to the express provision of the 22d section of the Judiciary act, but no writ of error was taken out. The Court declared that if the executions were irregular "the court from which they issued ought to have been moved to set them aside. They were not void, because the marshal could have justified under them; and if voidable, the proper means of destroying their efficacy had not been pursued."—4 *Cranch*, 328—333. See also citation, p. 478: "When a court has jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other Court."—*Elliott vs. Piersol*, 1 *Pet.*, 340.

In the *United States vs. Arredondo*, it was laid down as a universal principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter, the exercise is confided to his or their discretion, the acts

so done are valid and binding as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying their validity, are power in the officer and fraud in the party. All other questions are settled by the decision made, or the act done by the tribunal or officer, unless an appeal or other revision of their proceedings is prescribed by law.—6 *Pet.*, 729–'30. See also *Grignon's Lessee vs. Astor*, 2 *Howard*, 338.

The correctness of an attainder cannot be controverted in a collateral action; the party must first reverse the attainder.—*Hylton vs. Brown*, 1 *Wash., C. C. R.*, 343.

3rd. The 5th sec. of the act of 17th July, 1862, enacts that it shall be a sufficient bar to any suit by such person to recover possession of such property—to allege and prove the plaintiff is one of the persons described in the section.

The defendant has availed himself of this section.

The privilege granted by this enactment was the right of the defendant on purchasing the property; the defendant also, by becoming the grantee, acquired such vested rights in the property, neither of which could the amnesty proclamation of the President, or special pardon of the plaintiff, affect. A pardon has no other effect than an extinguishment of the rights of the sovereignty to proceed farther against the person pardoned, and does not affect the rights of third persons.

Besides, this was a conditional pardon, and expressly reserved all rights of persons who had acquired title to property confiscated, and prohibited the recipient of the pardon from claiming them.

Where the forfeiture of an estate to the Commonwealth on account of treason and in pursuance of an act of the Legislature is complete, a pardon without words of restitution does not restore the estate.—*Aldrich vs. Jessup*, *Grant*, 158.

A pardon only releases a party from conviction by Government, but can have no effect upon the rights of

persons. It cannot be contended that a pardon is equivalent in effect to a reversal of the judgment of conviction, and removes all the consequences of the crime and conviction, because we know that in a variety of instances the effects of the conviction remain, notwithstanding the pardon. Thus, a pardon will not cure the corruption of blood under the English law, caused by an attainder of treason or felony; nor will it relieve a forfeiture either of lands or goods arising upon such attainder.—2 *Hawk. P. C.*, 549; *sec.* 54, 57. 7 *Bac. Al.*, 418.

So, if a man have been attainted of felony and afterwards pardoned, yet he shall not be sworn of an inquest, for that he is not *probus et legalis homo.*—*Bulst. part* 2, *p.* 154.

Lord Hale says a pardon does not always make a man honest, and, therefore, he shall not be a juryman.—2 *Hale's P. C.*, 278.

So, in New York, where persons adjudged to imprisonment for life in the State prison are declared to be civilly dead to all intents and purposes in law, a pardon to a man so sentenced will not annul or affect a subsequent marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor divest his heirs of the interest acquired in his estate in consequence of such, his civil death.—10 *Johns*, 232. And a pardon will never release an interest that may be acquired by a private individual in a share of the penalty incurred. 4 *Wash. C. C. R.*, 64. 2 *Bay R.*, 565. Nor will it remit costs to which parties may be entitled.—2 *Whart.*, 440.

In Virginia it has been decided that a Justice of the Peace who is convicted of felony, forfeits his office, and is incapacitated from acting under his commission; and a pardon will neither avoid the forfeiture, nor restore his capacity.—*Leigh*, 724.

A pardon does not restore offices forfeited, or property or interests vested in others in consequence of conviction and judgment.—*Ex parte Garland*, 4 *Wall*, 334.

Respectfully submitted,

A. G. RIDDLE,
S. L. PHILLIPS, } *For Defendant.*

1 Mass 627
2 Ford 319
Indiana, etc. 5v
9 Standard Supp. 678
6 Ga 89 Ga 6
13 Fed 290
Dale 22-9-
Cowhl 524
24 Ford 203
1 Blank 580

In the Supreme Court of the U. S.

SUPPLEMENTAL BRIEF OF R. T. MERRICK, FOR PTF. IN ERROR.

DECEMBER TERM, 1870.

HENRY B. TYLER, *Plaintiff in Error*
vs.
JOHN DEFREES, *Defendant in Error.*
No. 24.

Plaintiff's Supplemental Brief.

The plaintiff in error brought ejectment to recover certain property in the City of Washington. The defendant pleaded title from a purchaser at a sale of the property under a judicial decree made in proceedings instituted under the Confiscation Act of July 17, 1862. The issue involved the validity of that decree.

The question to which this supplemental brief will be confined, relates to the jurisdiction of the court by which the decree was passed directing a sale of the property sued for, which depends in part upon facts peculiar to this particular case.

The other and more important question, lying at the foundation of all proceedings had under the act of July 17, 1862, and relating to the conformity of those proceed-

ings with the Constitution of the United States, will be left where it was placed in the brief originally filed, and is submitted upon the exhaustive argument of Mr. Curtis made at the first hearing of the cases of McVeigh and Garnett.

When the record of a judgment or decree is brought before the Court collaterally or otherwise, it is always proper to inquire whether the Court which rendered the judgment or decree had jurisdiction.

Jurisdiction is acquired by a court in either one of two modes:—*first*, as against the person of the defendant by the service of process upon him; or *secondly*, by process against the property of the defendant within the local jurisdiction of the Court.

Boswell's Lesee vs. Otis. 9 Howard, 348.

No principle is more vital to the administration of justice than that which provides that no man shall be condemned in his *person* or *property* without notice and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for service on the party, should be subjected to a strict legal scrutiny.

Jurisdiction is not to be assumed upon the general ground that the subject-matter is within the power of the Court. This would dispense with the forms of law prescribed for the security of absent parties. The inquiry should be, whether the requisites of the statute have been complied with so as to subject the property in controversy to the judgment of the Court.

Boswell's Lessee vs. Otis, 9 Howard, 348.

The first question in this case, therefore, is:—*did the Court, under the facts found by the jury in this case,* (See special verdict,) *have jurisdiction in the confiscation case?*

The facts as they appear from the special verdict, are, that, on the 13th day of June, 1863, the Marshal of the District of Columbia, in pursuance of instructions addressed to him by the United States District Attorney for that District, seized the property in question; that, on the 16th day of June, 1863, the District Attorney initiated proceedings for the condemnation of the property by filing a libel, that upon the filing of this libel an order for process was granted; that in consequence of this order, a monition issued out of the clerk's office, addressed to the Marshal and directing him *to attach the property and detain the same in his custody until the further order of the Court in the premises*, and to give due notice to claimants, &c., &c., that notice, such as was required by the Court, viz: publication of the order for process in a newspaper in the city of Washington, was given; but that the Marshal did *not* attach the property, as required by the monition, *and never made any return whatever to the monition.* (See Record, pp. 8, 9, 10, 11, 12, 13.)

It is submitted, as a preliminary proposition, that the title of the plaintiff was not divested by the mere act of seizure; but that the Act of Congress, in accordance with the provisions of the Constitution of the United States, contemplated and directed the institution of judicial proceedings to accomplish that purpose. The act provides, "that to se-
"cure the condemnation and sale of any of such property,
"after the same shall have been seized, so that it may be
"made available for the purpose aforesaid, proceedings
"*in rem* shall be instituted in the name of the United
"States in any District Court, &c., &c., which proceedings
"shall conform as nearly as may be to proceedings in ad-

"miralty or revenue cases; and if said property, whether "real or personal, shall be found to have belonged to a "person engaged in rebellion, or who has given aid or "comfort thereto, the same shall be condemned as enemies "property, &c., &c. Act of July 17, 1862, Sec. 7.

The proceedings are assimilated to proceedings in admiralty; but *judicial* proceedings of some kind are essential and absolutely necessary in order to divest the title of the owner.

Fairfax v. Hunter, 7 Cranch, 625.

United States v. Repentigny, 5 Wallace, 265.

Bennett v. Hunter, 9 Wallace, 335.

Bigelow v. Forrest, 9 Wallace, 339.

3 Blackstone's Commentaries, 258.

II.

Now, therefore, assuming that judicial proceedings were essentially necessary, the regularity of the proceedings in each particular instance becomes legitimate matter of inquiry. Here, however, in a collateral issue, like the present, it is admitted that we are, perhaps, restricted to the single question of *jurisdiction*.

The act requires that "the proceedings should conform as nearly as possible to the proceeding in admiralty and revenue cases."

The general jurisdiction in admiralty and revenue cases is regulated by the Act of Congress of Sept. 24, 1789, (1 Stat. at Large, p. 76, 77.) Various decisions, in which this act received a judicial construction, are referred to in the defendant's brief, to show that, by the fact of seizure under the direction of the District Attorney, the court obtained juris-

diction of the thing seized. But they only show that the *seizure* ascerained and determined the *forum* wherein judicial proceedings were to be instituted, but did not of itself subject the property to the judgment of the court.

See The little Ann, 1 Paine, C. C., 41.

The Washington, 4 Blatchford, 102.

Keene v. United States, 5 Cranch, 304.

The Brig Ann, 9 Cranch, 289, 291.

The seizure established the forum which the act left to a *contingency*. In other cases, the forum was not dependent on a contingency, but was fixed by the act.

2. After the forum was ascertained, what was to be done? The Act of Congress of March 2, 1799, section 69, (1 Stat. at Large, p. 678,) provides that "all goods &c., &c., seized by virtue of this act, shall be put into and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had as by this act are required to ascertain whether the same have been forfeited or not." And the same act, section 89, goes on to provide that "the collector within whose district the seizure shall be made, or the forfeiture incurred, is hereby enjoined to cause suits for the same to be commenced without delay, and prosecuted to effect: &c., &c., &c."

These sections evidently contemplate a second seizure of the property by the Marshal as an officer of the court. The act provides that the collector shall retain it *only until the institution of proceedings in court.* As soon as these proceedings are instituted, the Marshal, in virtue of the process and monition of the court, must take it out of the hands of the collector and into his own custody. For "as soon as the Mar-

"shal seizes the same goods under the proper process of the "court, the marshal is entitled to the sole and exclusive "custody thereof, subject to the future orders of the court."

Ex parte Hoyt, 13 Peters, 290.

The admiralty rules have been framed under this view of the law. Rule 22 requires that "all informations and "libels of information upon seizure &c., &c., shall conclude "with a prayer of due process, &c., &c." And rule 9 prescribes that "in all cases of seizure, and in other suits and "proceedlngs *in rem*, the process, unless otherwise pro- "vided for by statute, shall be by a warraut of arrest of "the ships, goods, or other things to be arrested; and the "Marshal thereupon arrest and take the ships, goods, or "other things into his possession, &c., &c., &c."

What need of a warrant of arrest, if the property was already in the custody of the court and subject to its judgment? The office of the process was to bring it into the court.

The duty of the Marshal in executing the process "*is to arrest the property seized, by taking it into his custody;*" and his return is to be, that he has arrested the thing, and cited all persons interested &c., &c., as he was by the warrant ordered to do.

Conkling's Admiralty, pp. 494, 4.

Then and not till then the jurisdiction of the court attaches.

3. A court acquires jurisdiction only by either one of two modes: 1. As against the person, by service of process. 2. *In rem*, by arresting the thing under the order or writ of the Court.

The Propeller Commerce, 1 Black, 580, 581.

In a proceeding either *in personam* or *in rem*, the process must be the process of the court; it must be a judicial process. What was the seizure made by the order of the District Attorney in this case? Simply an executive act, and therefore not a judicial notice. The Marshal, in making that seizure, acted as the agent of the District Attorney, or of the executive branch of the Government, not as the officer of the Court. In a suit by the United States, could a court obtain jurisdiction *in personam* by an executive mandate, without any process from the Court directing the defendant to appear?

Again, the object of process, either *in personam* or *in rem*, is to give notice of a pending case. Did this seizure, under the act of July 17, 1862, give such notice? The President may seize for the purpose of *using*, and if he *chooses* he may take proceedings to condemn. Under the revenue acts, the person making the seizure is required to proceed at once. Under this act the President may never proceed.

4. The evidence of seizure is the Marshal's return—a jurisdictional fact which must appear in the record. But conceding that the *fact* of seizure by the officer of the Court might be proved, in the absence of a return, from other sources, there is *no* proof of such seizure here. And what appears in this record?

1. A writ, and no return upon it.

2. No finding by the jury of the fact of seizure.

There is here an unexecuted writ or process, and no return whatsoever. There is nothing to show that the Marshal, as an officer of the court, ever had this property in his custody, nothing to show that that was done which could give the Court jurisdiction.

That the person who at one time seized this property was the same person who was Marshal of the Court when the monition issued, can make no difference. There is nothing to prevent that person from acting in two or more different capacities, and he certainly did not act as the officer of the Court, or in obedience to any process issuing from it, when he made the seizure in question. His bond as Marshal would not have been liable for any misuser of the property, though possibly it might have been liable because he did not seize it and take it into his custody. The Marshal can act *officially* only in obedience to the orders of the Court

R. T. MERRICK,

For Plaintiff in error.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 24.

HENRY B. TYLER,
Plaintiff in Error,

vs.

JOHN DEFREES,
Defendant in Error.

SUPPLEMENTAL BRIEF.

A. G. RIDDLE,
L. MADISON DAY,
Of Counsel.

Judd & Detweiler, Steam Job Printers, corner of Penn. ave. and 11th st.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 24.

HENRY B. TYLER, PLAINTIFF IN ERROR,

vs.

JOHN DEFREES, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF.

This was an action of ejectment.

The defence was a plea in bar, setting up that the property in controversy had been condemned and sold under the provisions of the confiscation act, 17th July, 1862, and that defendant derived his title from a *bona fide* purchaser, at the judicial sale thereof.

The first objection raised to this defence is that the seizure of the property condemned was insufficient and invalid. But that the seizure was a valid and legal seizure there can be no doubt.

The marshal's return of seizure (Record, 9) is as follows: "I do certify that I have made seizure of the within-described property, and given notice to the tenants in possession, as within directed.

W. H. LAMON,
U. S. Marshal, D. C.

"JUNE 13, 1863."

In the case of the Grotius, (9 Cranch, 370,) Mr. Justice Washington says: "When the facts are ascertained, there can be very little doubt what constitutes a valid seizure as prize. It is clear that some act should be done indicative of an intention to seize

and retain as prize, and it is sufficient if such intention is fairly to be inferred from the conduct of the captor." (See Brig Ann, 9 Cranch, 291.)

In a proceeding *in rem* it is *not* necessary that the property should be in the actual possession of the court or its officers. "It is sufficient if the possession is held by *any one* for the Government at the time of service of process by the marshal, and is afterwards continued with the assent of the marshal, as the possession of the former will be adjudged the possession of the marshal." (See Schooner Bolina, &c., 1 Gall., 75, 81; S. P., 18 Me., (6 Shep.,) 231; 1 Gilman, 521. And even in proceedings *in rem*, as respects personal property, the presumption when property is libelled is that the property is in the custody of the law, and at the disposal of the court, and monitions may be issued to persons having the actual custody of the same to obey the injunctions of the court respecting it. (1 Gall., 81, 82.)

"Physical force," says Judge Story, Bradstreet *et al. vs.* Neptune Ins. Co., 3 Sum., 600, 616,) "actually applied, is not indispensable to constitute a seizure or detention. It is sufficient if the property be potentially within the reach and subject to the process of the Government. Thus an embargo laid on vessels in a port is not less real as an arrest, seizure, or detention because it is unaccompanied with a physical force put on board to prevent a departure from the port. The restraint may be, and is, just as operative if there is a moral force and power of immediate action which subdues resistance. There is a complete subjection or *deditio* to the local sovereignty when it has the means and capacity and will immediately at hand to enforce obedience to its orders."

In the cases of The Slavers, (Reindeer, 2 Wallace, 383, 402,) where the collector placed a custom-house officer on board of the vessel on her arrival in port, and that officer was in the actual possession of the vessel when the same was attached by an officer under State process, but the custom-house officer still continued in possession, and the collector, by the directions of the district attorney, made a formal seizure for a violation of the slave-trade act some days before the libel was filed, and the

revenue officer remained in possession until the sale, when the proceeds were paid into court, and it was held that the attachment was invalid, and that the seizure was rightfully made," and the condemnation sustained.

At page 402 of the above case Mr. Justice Clifford says: "Immediately on the arrival of the vessel at Newport the collector placed a custom-house officer on board of her, and that officer was in the actual possession of the vessel and cargo when the attachment was made. Both vessel and cargo were then in the custody of the United States, and so, in fact, remained until the same were sold by the marshal by the order of the Circuit Court. By order of the district attorney the collector, some days before the libel was filed, made a formal seizure of the vessel for a violation of the slave trade act; and at that time the revenue officer, who had taken possession of the vessel before she was attached, still had her in custody, and he remained in possession of her until the sale, when the proceeds were paid into the registry of the court. Under these circumstances it is clear, we think, that the case of Taylor *et al. vs.* Carryl does not apply, and that the seizure was rightfully made."

Upon the authority of these cases we can safely rely upon the seizure involved in the case before the court being declared unquestionably valid, as the Record shows beyond the possibility of a doubt that the property condemned was in the full and undisturbed possesssion of the United States to the exclusion of all the world.

Nor is there any evidence to show that the seizure was abandoned. The Abby, 1 Mason, 360; 6 Shep., 231; 1 Gilman, 531; 18 How., 122.

In Jecker *vs.* Montgomery, 18 How., 110, 122, it is said: "That captors may so act toward prize property as to forfeit their rights as captors and render themselves liable to make restitution, with or without damages. But before the court can so declare, a case of forfeiture of rights, free from all reasonable doubt, must be made out."

And it has also been held that in a proceeding in *rem* against real estate, which is within the jurisdiction of the court, *no actual*

seizure by the officer of the court is necessary. 9 Pick., 170; 13 Mass., 130; 5 Greenl., 453; 11 Pick., 341; 2 N. Hamp., 137; 13 Mass., 128; 8 Pick., 402.

In any and every view then we think there can be no doubt as to the sufficiency of the seizure involved in this case.

Plaintiff further seeks to avoid the defence set up in this case on the ground that the judicial proceedings show that the property in controversy was condemned before the return day of the monition.

But this, if true, will not avail plaintiff *in a collateral* action.

The court certainly acquired jurisdiction by the seizure of the property and the filing of the libel. And what follows or takes place in a case after jurisdiction is once acquired, is mere matter of procedure. But matter of procedure in no way or manner affects the jurisdiction of the court.

Where proceedings *in rem*, (or in the nature of such,) then, are commenced by an attachment or seizure of property within the territorial jurisdiction of the court, and jurisdiction has once been thus acquired by the seizure or attachment of property, jurisdiction will not be lost by a subsequent failure to give constructive notice, by publication or otherwise, although expressly required by statute. Paine *vs.* Moreland, 15 Ohio, 435; Harney *vs.* Tyler, 2 Wall., 343, 344; Lessee *vs.* Loring, 17 Ohio, 409, 431; Benson *vs.* Cilley, 8 Ohio State, 604, 615; Carleton *vs.* Wash. Ins. Co., 35 N. Hamp., 165–'6; Voorhies *vs.* Bank U. S., 10 Pet., 449; Bruce *vs.* Cloutman, 45 N. Hamp, 37, 38.

In like manner, proceedings instituted to effect a sale of real estate, which has descended from an ancestor, to pay debts, partake so far of the nature of proceedings *in rem*, that if there be enough set forth in the application to the court to give jurisdiction over the *res*, jurisdiction will not be lost or defeated by any irregularity in its exercise, nor by a want of actual or constructive notice to the parties in interest, by publication or otherwise. Grignon's Lessee *vs.* Astor, 2 How., 319; Florentine *vs.* Barton, 2 Wall., 216; Benson *vs.* Cilley, 8 Ohio State, 604, 615;

McPherson *vs.* Cunliff, 11 S. and R., 422; Rogers *vs.* Williams, 8 Eng., (Ark.,) 507; Woods *vs.* Monroe, 17 Mich., 238, 241.

In Williams *et al. vs.* Bruce, 3 Wisconsin, 777, the court well says: "The object of the publication of notice, as required by the 17th section of the Revised Statutes, is not to give the court jurisdiction of the writ and subject-matter of the suit, but to inform the defendant, if possible, that proceedings have been taken against him, and to give him an opportunity to defend."

And in Lessee of Paine *vs.* Moreland, 15 Ohio R., 443 to 445, the court, in reference to jurisdiction and notice by publication in a proceeding *in rem*, where the statute expressly provided that if the notice by publication was not given, the attachment should be quashed, says: "Are the proceeding in attachment void? It is contended they are void, because no notice of the pendency of the attachment was given, as required by the statute. If the jurisdiction of the court once attached, subsequent irregularities would render the judgment voidable only, and it would remain valid until reversed, and cannot be impeached collaterally.

"What then gives the court jurisdiction in a proceeding in attachment? The filing the proper affidavit, issuing the writ and attaching the property. The moment the writ goes into the hands of the officer, he is authorized and required to seize the property; when this is done the property is taken out of the possession of the debtor into the custody of the law. * *

"A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court once having by its process acquired the power to adjudicate upon a person or thing, it has what is called jurisdiction. This power or jurisdiction is only acquired by its process. To give jurisdiction is the object of process. The mode of executing or serving process is sometimes directed or permitted to be by notice by publication. All process issues under the seal of the court.

"Notice by publication is not process, but in certain cases in contemplation of law, is equivalent to service of process. The process in attachment is the writ authorizing and directing a seizure of the property. No process is issued against the person, because the proceedings are *in rem*.

"The statute regards it, however, but just that notice should be given to the debtor, not for the purpose of giving the court jurisdiction over the subject-matter, but to permit the debtor to have an opportunity to protect his rights, and directs that the writ shall be quashed if it be not given. The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of the court not having jurisdiction or power are void—in the latter, voidable only. A court, then, may act first, without power or jurisdiction; second, having power or jurisdiction, may exercise it wrongfully; or third, irregularly. In the first instance, the act or judgment of the court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed upon error. The third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence, there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power.

"Now what happened in this instance? The court had the power, by the service of its process, to proceed and give judgment; but a circumstance occurred after having acquired such power, which forbid them the exercise of it; but having it, they did exercise it, which was error.

"But it can only be corrected by writ of error. Such appears to have been the decision of the court in Parker *vs.* Miller, 9 Ohio Rep., 108, and cases cited there. The case in 10 Pet. Rep., (Voorhees *vs.* The Bank of the United States,) recognizes these principles."

In Bruce *vs.* Cloutman, 45 N. Hamp., 37, 38, the court says: "Where the proceedings have been properly commenced and jurisdiction obtained by the attachment of property of the debtor

in the hands of a trustee, (King *vs.* Holmes, 27 N. H., 268; Kendrick *vs.* Kimball, 33 N. H., 176,) a defect in the notice, that should subsequently be given to the principal defendant, is an irregularity that will not render the judgment a nullity here, although the defect may be sufficient cause for the reversal of the judgment on error. Gilman *vs.* Thompson, 11 Vt., 641; Gorrill *vs.* Whittier, 3 N. H., 269; Gay *vs.* Smith, 38 N. H., 175; Paine *vs.* Moreland, 15 Ohio, 435; Bannister *vs.* Higginson, 15 Me., 78; Hawes *vs.* Hathaway, 14 Mass., 233; see Blanchard *vs.* Goss, 2 N. H., 494; and Granger *vs.* Clark, 22 Me., 130."

In Woods *vs.* Monroe *et al.*, (17 Mich., 238, 241,) the court in reference to the subject of notice by publication, and the effect of a want of the same, said: "There was, therefore, a license by a court having jurisdiction for the sale of all the lands; and if, as claimed, the order for hearing was not published the full four weeks required by the statute the complainant's title will not be affected thereby." And in Shelton *vs.* Pease, (10 Missouri, 473, 481,) it was *held* that a failure to give notice to a creditor of an application for a discharge in bankruptcy cannot be taken advantage of in a collateral action. (See 4 Annual, La., 401.)

It cannot be objected in a collateral action that the notice in an attachment suit was insufficient. (Grey *vs.* Thompson, 17 Iowa, 107.)

A judgment in an action in which the required number of day's notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding. (Billinger *vs.* Torbell, 16 Iowa R., 491.)

And the high court of errors and appeals of Mississippi (25 Miss. R., 429; 35 Miss. R., 24;) *held* that the condemnation of land by proceedings *in rem* were absolute and conclusive upon all the world, though no other notice whatever was given than that resulting from the seizure or proceedings against the property itself.

In a proceeding *in rem* no notice is necessary. (Thompson *vs.* Steamboat Morton, 2 Ohio State R., 30; Monroe *vs.* Douglass, 4 Sandf. Ch. R., 126.)

For seizure alone is notice. (The Mary, 9 Cranch, 120, 144;

Hollingsworth *vs.* Barbour, 4 Pet., 475; Heating *vs.* Spink, 3 Ohio State, 114, 115; Thompson *vs.* Steamboat Morton, 2 Ohio State, 30; Scott *vs.* Sherman, 2 William Black., 977.)

In the case of Mary, (9 Cranch, 126, 144,) Chief Justice Marshall says: "Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have an interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary has constructive notice of her seizure, and may fairly be considered as a party to the libel."

And this principle is fully recognized by Judge Story in 3 Sumn., 609, and also by the Supreme Court of the United States in 24 How., 205, 206, and the above language of Chief Justice Marshall quoted with entire approbation and approval. Judge Story also, in 1 Gall., 79, expressly says: "The seizure itself is full notice, for the possession itself is notorious and open." His remarks, then, in 3 Sumn., 500, (where there was no seizure,) in reference to notice, must be understood as applying to the special facts of that case, and not as intending to assert generally that seizure was not notice.

And the court, in the case in 24 How., in reference to Harris *vs.* Hardeman, (14 How., 339,) says: "But the opinion of the court clearly recognizes the principle that constructive notice in certain cases may be sufficient to bind the party."

In Scott *vs.* Sherman, (2 Wm. Bl.,) Judge Blackstone, in his most elaborate judgment, says: "And though it be said that no notice is given to the owner in person, and that, therefore, he is not bound by the condemnation, not being a party to the suit, yet the seizure itself is notice to the owner, who is presumed to know whatever becomes of his own goods."

In Hollingsworth *vs.* Barbour, (4 Pet., 475,) the court said:

"It is an acknowledged general principle that judgments and

decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principle of natural justice, that no man's right should be prejudiced by the judgment or decree of a court without an opportunity of defending the right. This opportunity is afforded, or supposed in law to be afforded, by a citation or notice to appear, actually served; or constructively by pursuing such means as the law may, in special cases, regard as equivalent to personal service. The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule.

"They are not properly exceptions. The law regards the seizure of the things as constructive notice to the whole world; and all persons concerned in interest are considered as affected by this constructive notice. But, if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized and taken into the custody of the court."

In Keating *vs.* Spink, 3 Ohio State (N. S.) R., 114, 115, the Supreme Court of Ohio has well and forcibly said: "Possession is the essential element upon which the jurisdiction of the court depends, and as this possession is deemed that of the sovereignty under whose authority the court sits, if any question can be regarded as settled by the unanimous opinion of courts and jurists, it is this: that "the law regards the seizure of the thing as constructive notice to the whole world." (Hollingshead *vs.* Barbour, 4 Pet., 475.) Other means for giving notice may be provided at the discretion of the sovereign power, upon the observation of which the jurisdiction may, or may not, depend; but where they are not prescribed, the power of the court over the thing when taken into custody of the law, is perfect and complete, and the final disposition of it binding upon the world."

So in Thompson *vs.* Steamboat Morton, 2 Ohio State, (1

Warden, 30,) the court said: "The other objection has doubtless arisen from confounding the requisites of a proceeding *in personam* with those of a proceeding *in rem*. By the former, the court acts upon its jurisdiction over the person; by the latter, upon its jurisdiction over the property itself, which is taken and held within the power of the law. It is undoubtedly a general, if not a universal law, that in order to bind a defendant, or to confer any rights upon a plaintiff, by force of a judgment in a personal action, the defendant, if he does not waive a notice by an appearance, must be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend. But the rule is different in a proceeding *in rem*, where the action of the court has relation to the thing or property which it binds in the absence of any personal notice to the party interested. Story's Conflict of Laws, ch. 14, § 549; Boswell's Lessee *vs.* Otis, 9 How., 336.

And the same doctrine is laid down by Mr. Justice Yerger, in reference to a seizure of land, in a *most elaborate and well considered opinion*, in Stewart *vs.* Board, etc., 25 Miss. R., 479, and to which we would solicit the special attention of the court.

And in the case of New Orleans, etc., *vs.* Hemphill, 35 Miss. R., 24, Chief Justice Smith has well said, of notice resulting from a seizure of land:

"As a general principle, notice, either actual or constructive, to the party affected by the judgment of the court is essential to its validity. But there is an exception to this rule, recognized at the common law and by the jurisprudence of this State. This exception applies to the class of cases styled proceedings *in rem*, or suits in the nature of proceedings *in rem*.

"In these proceedings or suits, the judgments of the courts are conclusive against all persons interested in the subject-matter of the suit, whether they have had notice of the proceedings or not. And their validity and conclusiveness rests upon a principle of public policy. In these cases it is considered that jurisdiction of the parties in interest is acquired by a seizure of the thing which is the subject-matter of litigation, and on which

the judgment is to operate. The seizure of the thing is considered notice to all parties interested."

In Gray *vs.* Kimball, (32 Me. R., 299, 307,) the court very correctly says: "And laws authorizing proceedings *in rem* may be enforced against the property seized when the real owner may not be informed thereof."

And in Monroe *vs.* Douglass, (4 Sandf. Ch. R., 126,) a proceeding *in rem* against real estate in Scotland was *held* valid, even as against a minor, notwithstanding the proceedings took place during the period of our Revolutionary war, and the minor in this country, and consequently had no notice and no means of appearing and objecting to the proceeding.

The publication of monition, then, not being a jurisdictional matter, the jurisdiction of the district court is undoubted, and its decrees of condemnation final and conclusive in a collateral action.

For where a court has jurisdiction, it has a right to decide every question which occurs in a cause, and its decision, whether correct or otherwise, is binding in every other court until set aside by the court which rendered it, or is reversed by some superior appellate tribunal. 1 Pet., 340; 10 Pet., 473; 2 How., 343; 24 How., 450, 457; 1 Wallace, 627, 634.

And where a judgment is *in rem*, it is clear and well settled that it cannot be impeached collaterally for error or irregularity. Cammell *vs.* Sewell, 3 Hurl. & Nor., 617; S. C. in Error, 5 H. & N., 728; Castrique *vs.* Imrie, 8 Com. Bench, (N. S.,) 1; S. C. in Error, ib., 405, (98 Eng. C. L., 405.)

And it has been *held* by the high court of errors and appeals in Mississippi that where a jugment *in personam* was taken by default before the time for pleading had passed, it would not avail the party even on error, as his remedy was a motion in the lower court to set aside the default for irregularity. 12 Smedes & Mar., 550.

As to the constitutionality of the confiscation act, as well as the nature, character, and the validity of the form and mode of

proceeding, we refer to an accompanying consideration of "The constitutionality and legality of confiscations in fee, under act 17th July, 1862," by Mr. Day, herewith filed, and which it is respectfully solicited may be considered by the court as a part of this supplemental brief.

All of which is most respectfully submitted, with entire confidence that the judgment will be affirmed.

A. G. RIDDLE,
L. MADISON DAY,
Of Counsel.

Marriage

1 character of divorce sentence

THE

CONSTITUTIONALITY

AND

LEGALITY

OF

CONFISCATIONS

IN FEE,

Under Act of July 17, 1862.

"Their right and constitutional power to do so cannot be even plausibly controverted."—*Court of Claims. Per Chief Justice Casey.*

By L. MADISON DAY.

NEW ORLEANS.
1870.

THE CONSTITUTIONALITY AND LEGALITY

OF

CONFISCATIONS

IN FEE.

I. *Congress has power to confiscate the property of rebels and traitors, in fee, for treason.*

The provision of the Constitution, Art. III, sec. 3, par. 2, which says: "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," has reference *only* to attainder as at Common Law. This is evident from the fact that Congress is expressly inhibited by the Constitution from passing a bill of attainder. Art. I, sec. 9, par. 3. For it would be absurd to say that the power given to Congress by the Constitution to prescribe the punishment of treason could, by any possibility, have any reference whatever to an attainder of treason for life, by legislative act, when it is expressly declared in that same Constitution that "no bill of attainder or *ex post facto* law shall be passed."

And as Congress is thus prohibited by the Constitution from passing a bill of attainder of any kind, it is very evident that there can be no attainder under the Constitution, except as a resulting consequence from a sentence of death for treason.

In England, an attainder for treason was had in one of two ways: First, by bill of attainder; second, by virtue of a sentence of death (or outlawry, which is equivalent)—that is, an attainder as a consequence resulting from a sentence

of death (or outlawry) for treason. Now, as the first of these two ways of effecting an attainder is expressly prohibited by the Constitution, it follows, irresistibly, that the attainder of treason, corruption of blood, &c., mentioned in the Constitution, could only be had or brought about, as a resulting consequence, as at Common Law, from a sentence of death, for, that universally conceded highest of crimes, treason.

An attainder of treason, then, as mentioned in the Constitution, only relates to attainder as at Common Law. And, by the Common Law, a man was said to be attainted only when sentence of death was passed upon him. Attainder was a consequence resulting from a sentence of death; and corruption of blood and forfeiture of the real estate of the offender followed (as a matter of course) from attainder. And these consequences of an attainder at Common Law extended *in perpetuum*. But the framers of the Constitution thought that the demands of public justice would be sufficiently satisfied, in the absence of express legislation on the subject, by tying up the corruption of blood and the forfeiture of estate, as a resulting consequence from an attainder of treason, to the lifetime of the party attainted. Hence, the constitutional provision that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. See 2 Sprague, 140–1.

Congress has, therefore, power to *confiscate* the property of rebels and traitors, in fee, for treason.

And to fully understand and comprehend this important question, it is necessary to bear in mind that the Common Law forms the basis of the Constitution and laws of the United States. 1 Gallison's Rep., 489; 1 Baldwin's R., 559; 2 Pet., 144; 5 Pet., 241; 8 Pet., 659; 3 Pet., 446.

The history of the times, too, is to be considered, in giving

a construction to the Constitution. 12 Pet., 657, 721; 18 How., 272. And when well-known terms of the Common Law are used in the Constitution or Statutes of the United States, and are not defined in the same, they are to be understood in the sense in which they were known and used in the Common Law. 2 Day's R., 211, 212, 176; 3 Wheat., 610, 630; 18 How., 280, 272, 311, 313, 307.

These propositions being fully established, let us recur to the provision of the Constitution which says: "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." Now, the word *attainder* has a well-known signification and meaning in the Common Law, and that is the immediate, inseparable, resulting consequence from a *sentence of death*, for treason or other felony. 4 Bl. Com., 380, 381, 386, 388; 1 Stephen's Com., 408, 411; 4 Steph. Com., 198, 199, 446, 448, 452, 454; 1 Mes. & W., 145; Whart. L. Dict., Attainder. Attainder follows as a consequence from the sentence of death. And corruption of blood and forfeiture of estate follow as consequences from an attainder. There is no attainder until sentence of death, or that which is equivalent, (as outlawry,) is passed. And "all the forfeitures of real estate created by the common law" follow "as consequential upon attainders, by judgment of death or outlawry." 4 Bl. Com., 386. But "the forfeitures in cases of treason and felony are no part of the judgment." *Ib.* "They are the consequences of such judgment." *Ib.* And this is further manifest from the fact that "by the Common Law such lands" (that is lands of which the party was seized in fee) "were not vested in the actual possession of the king during the life of the offender." 3 Co. 10; Stampf. P. C., 191; Leon. 21; Bro. Coron., 208, 210; 4

Bouv. Bac. Ab., 339. But the forfeiture of personal property follows, as the immediate resulting consequence, from a conviction for treason or other capital felony. 4 Bl. Com., 387. Of course, then, the forfeiture of the personality was no part of nor any consequence of the judgment. And it is said that the personality was given to the king immediately on the conviction, (that is, "a man is said convict before he hath judgment; as if a man be convict by confession, verdict, or recreancie," Co. Litt., 390 b.,) "for the trouble and charge he has been at in holding courts and bringing the offender to justice." 4 Bouv. Bac. Ab., 340; 1 Com. Dig., (Day's ed.,) 406, note *n*. And all these consequences were a part of the Common Law. 1 Steph. Com., 410; 2 Bl. Com., 384; 2 Kent's Com., 505, 10th ed.; 2 St. Const., § 299. The provision, then, of the Constitution in relation to the punishment of treason is not a limitation of the power of Congress. It merely declares that the resulting consequences from any judgment for treason shall not produce a forfeiture of real property beyond the life of the party. It does not say Congress shall not have power to confiscate the property of traitors beyond the term of their natural lives; it merely says, "but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." Now, the word *but* is a participle, and is equivalent in the sentence to *except*, and the true sense of the paragraph is that Congress shall have power to declare the punishment of treason, except that *attainder* of treason, that is, that the inevitable and inseparable consequence resulting from a mere sentence of death or other punishment for treason, shall not "work," that is, bring about, produce as an inseparable consequence therefrom, a forfeiture of real estate beyond the life of the party attainted. It simply prescribes, in the absence of Congress making any express

provision as to forfeiture of real estate for treason, that on the party receiving sentence under such law as might be enacted by Congress, the *resulting* consequence therefrom (which at Common Law would be an *attainder*, and a consequential corruption of blood and forfeiture of real estate) should not produce of itself a forfeiture of real estate beyond the lifetime of the offender. It therefore follows, that this provision of the Constitution, does *not* limit the power of Congress to punish treason to a forfeiture of the real estate for the term only of the life of the traitor; and that it has no application whatever to personality, because the personality was forfeited immediately by the Common Law on conviction, and before an attainder was had.

And this is further evinced from the fact that Congress, in 1790, after providing the penalty of death as the punishment for treason, made the following provision in the same act: "Provided always, and be it enacted, that no conviction or judgment for any of the offences aforesaid shall work corruption of blood and forfeiture of estate." 1 U. S. Stat., 117, sec. 24.

Now, this shows clearly that Congress at that early period considered that a forfeiture of real estate for life would follow in the absence of this provision, as the immediate inseparable consequence from a sentence of death under the act. It also shows that, notwithstanding the constitutional provision in regard to attainder, they believed that there would be a forfeiture of personality as at Common Law, upon a conviction merely, without an attainder. If such were not the case, then the above section of the act of 1790 was a useless and unmeaning piece of legislation. What necessity was there (as the penalty of death was all the punishment prescribed by the act of treason) to provide "that no *conviction* or judgment for any of the offences aforesaid shall work corruption

of blood or ANY forfeiture of estate," *unless Congress considered* that forfeitures as to personality would take place upon *conviction* merely, and that corruption of blood and forfeiture of real estate in fee would follow, as at the Common Law, unless expressly restricted and excluded by the statute?

Judge Sprague, (2 Sprague's R., 140,) with direct reference to this proviso, has well said: "The proviso declares that no conviction shall work corruption of blood or any forfeiture of estate. This shows that the law gives thought that death was a sufficient penalty, without confiscation following as a legal consequence of conviction. There is an analogous provision in the Constitution, Art. III, sec. 3, and as it has embarrassed some minds, it deserves attention."

It is, therefore, clear that Congress believed there would be the resulting consequence of attainder and corruption of blood and forfeiture of real estate for life upon the sentence merely of death for treason, and a forfeiture of personal property upon conviction of that offence, and hence they provided there should be no mere consequential or resulting corruption of blood and forfeitures. And contemporaneous construction is entitled (as said by the Supreme Court) to the highest consideration. 18 How., 279–80. The fact, too, that Congress can pass no bill of attainder, shows that the framers of the Constitution only had reference to attainder as at Common Law. Sec. 9, par. 3, Art. I, Const. In no other way was it possible, with such a provision in the Constitution, for an attainder to be had. Congress being expressly prohibited from passing any bill of attainder, corruption of blood and forfeiture of estate could only be worked or brought about as at Common Law. And the above provision can refer to no other mode or way of bringing about an attainder. Nor is it any answer to this position to say, because there are no Common Law offences as against

the United States, the above reasoning does not apply. The question is not whether there are Common Law offences of the United States. But the true inquiry is, what was meant by the framers of the Constitution? How did they consider the matter in question at that time? Did they believe that there would be the Common Law consequences of attainder and forfeiture of estate, on a sentence of death, for treason? The very terms of the Constitution as to attainder, as well as the provision in the act of 1790, show that both the framers of the Constitution and the members of that *early* Congress believed and considered that there would, at least, be Common Law consequences resulting from a conviction as well as from a sentence of death for treason, unless restricted by the Constitution and the law.

If such was not the fact, there would have been no occasion for the constitutional provision, as Congress was prohibited by the Constitution from passing any bill of attainder, and no necessity whatever for the proviso in the act, which only prescribed the penalty of death as the punishment for *treason*.

Besides, there has been great diversity of judicial opinion as to whether or not there were Common Law offences of the United States. Mr. Justice Story, in the case of the United States *v.* Coolidge *et al.*, (1 Gall. R., 488,) in a most learned and elaborate opinion, held that there were Common Law offences of the United States. True, this was afterwards overruled by the Supreme Court, (1 Wheat. R., 415,) on the authority of the case of the United States *v.* Hudson & Goodwin, 7 Cranch R., 32. But it is to be noticed that both these cases passed in the Supreme Court without argument; and in the case in 1 Wheat., 415, there was a difference of opinion among the judges, and they were willing to hear the question argued, but adhered to their

former opinion, because no counsel, beside the Attorney General, appeared to argue the question. Such having been the diversity of judicial opinion, and such the legislation of Congress, and such the prohibition of the Constitution in relation to attainder by Congress, it is fair to presume the framers of the Constitution, in providing against the consequences of attainder, were guarding against what they believed would be a Common Law consequence of attainder.

And this is further evinced from the fact that the words, "work a forfeiture," have also a well known meaning and signification in law. They are, then, to be understood, in construing the above clause in the Constitution, according to that well-known meaning and signification which is to bring about or produce as a resulting consequence. When, therfore, it was provided in the above clause in the Constitution that "no attainder of treason shall work corruption of blood or forfeiture," &c., it was most clearly not intended to abridge the previously unlimited power given to Congress to provide for the punishment of treason, but a declaration and a provision that no attainder of treason should bring about or produce as a consequence in law a forfeiture beyond the period of the life of the person attainted; and this construction is well sustained and fully warranted by the authorities.

In 2 Kent's Com., 19, top page, 11th ed., Chancellor Kent, in speaking of Calvin's case and the legal consequences resulting from a division of empire, well says: "The principle of the Common Law contained in that case, that the division of an empire worked no forfeiture of previously vested rights of property, has been frequently acknowledged in our American tribunals, and it rests on the solid foundations of justice." Here it is seen that it was the division simply of empire that worked or produced no for-

feiture of property. The language used cannot, by any possibility, be held or construed to mean that there was no power anywhere that might or could have produced a forfeiture of previously vested rights of property.

Again, in note (*a*) to 2 Kent, top page 489, 11th ed., in referring to what had been decided in certain cases referred to, it is said: "The doctrine is, that a recovery in damages of the value of a specific chattel does not of itself work a change of title, and transfer it to the defendant or his vendee, without satisfaction of the value found."

Here it is seen that the words, "work a change of title," have reference to the resulting consequences which flow from the recovery of damages as the value of a specific chattel.

And in Governor of Georgia *v.* Madrazo, 1 Pet., 128, Mr. Justice Johnson says: "Madrazo was not privy to that offence," (that of introducing slaves into the United States,) "and was innocent of any act that could work a forfeiture of his interest."

So Sir William Scott's language in *The Jonge Tobias*, 1 Rob., 329, will serve to illustrate the construction for which we contend. He there said: "Formerly, according to the old practice, the carriage of contraband worked a forfeiture of the ship, but in later times the rule had been relaxed to the forfeiture of the ship only when owned by the same person."

And in the United States *v.* Weed, 5 Wallace's R., 62, 73, Mr. Justice Miller, in speaking with reference to a resulting or consequential forfeiture by reason of the alleged fact of the permits for trade and intercourse within the prohibited sections not being found with the goods, as the regulations directed, says: "This was merely directory, and would not of itself work a forfeiture of the goods."

From this late decision, as well as the foregoing authori-

ties, and many acts of Congress too numerous for citation, it is seen that the words "work a forfeiture" are invariably used by courts and legal authors, as well as legislators, to denote or mean a resulting or consequential forfeiture, that is, a forfeiture that results and follows as a legal consequence from some prior act or thing.

And this being the invariable and legal meaning of the words "*work a forfeiture*," the construction and meaning of the above clause of the Constitution, providing that "Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," would seem to be free from all difficulty and of easy solution.

The latter part of the above provision, "but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," is not, and cannot according to any known rule of construction, be considered and held as a limitation of the previously unlimited power given to Congress to declare and fix the punishment of treason. The words used have no reference whatever to the power of Congress over the subject of treason. But they are a limitation, *simply*, as to the extent to which the then supposed consequential forfeitures, resulting and flowing from an attainder of treason, should extend.

This is the plain import and meaning of the words used. They mean no more, and they mean no less, than that the resulting consequences from an attainder of treason should not extend beyond the period of the life of the traitor; but they are no limitation whatever upon the power of Congress to declare the punishment of treason.

The declaration is *not* that Congress shall only have power to forfeit the estate of a party for treason during the period

of his natural life, but the express provision is that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

It is, therefore, seen that it was the attainder that was not to be allowed to work a forfeiture beyond the lifetime of the traitor. And this not only according to the express and positive words of the Constitution, but for the further reason that a forfeiture merely for the lifetime of the convicted traitor would be a matter of little or no importance whatever, as the forfeiture would terminate with the execution of the criminal, at which time only, as we have seen above, could real estate vest in possession. The vesting in possession, as well as the termination of the estate, therefore, would occur, *eo instanti*, and the forfeiture for life merely would practically amount to nothing. And in this view of the matter it might well be said that the above provision in relation to attainder amounts substantially to the abolition of all the forfeitures resulting therefrom. But in no possible view, as we think, can the provision relating to attainder be construed or held a limitation on the power of Congress to declare and fix the punishment for treason. Had the framers of the Constitution not intended Congress, by the broad and comprehensive words of the grant, to have full power to legislate in relation to the punishment of treason, it is but reasonable to suppose that they would have said so in words too clear to admit of doubt or controversy.

PROPERTY NOT CONFISCATED FOR TREASON.

II. *The Confiscations provided for in the Act are not Punishments and Confiscations for Treason.*

Treason and its punishment are provided for in the first section of the act. And the second section prescribes the

punishment for inciting to or engaging in rebellion. The other provisions of the statute relating to confiscation have reference to the acts therein specified as being with reference to property, *acts less and different from that of treason,* and accordingly prescribe confiscation as the consequence or penalty, *civilly* considered, attached by law to such acts, which is a less and different penalty from that previously provided for treason.

"Congress," says Mr. Justice Miller, in the case of the Hampton, 5 Wallace, 375, "had by several statutes * * defined certain acts or conditions growing out of the rebellion, which would render property liable to confiscation to the United States."

In the Amy Warwick, (2 Sprague, 140,) Judge Sprague says: "The objection assumes that there can be no condemnation unless the claimants are traitors. This is an error. As already stated, property may be treated as hostile, although the owner has not been guilty of treason. He may be an alien, owing no allegiance, or a citizen, whose opinions or wishes are not proved to be hostile, and yet be so situated, and his property be so used, as to subject it to capture as prize." S. P. 8 Cranch, 253; 18 How., 114.

And this view of the matter is fully sustained and amply borne out by the decision of the Court of Claims in the Cotton Cases. 2 Court of Claims, R. 529.

Chief Justice Casey, in delivering the opinion of the court in the cases just referred to, says: "We do not believe that the only aid or comfort which will prevent a recovery are such acts as would under the Constitution and laws constitute treason. The act of July 17, 1862, puts these and nearly similar words in juxtaposition with others which explain how they were used criminally and how in reference to property. In the second section it prescribes the punish-

ment for inciting to or engaging in the rebellion as a different offence from that of treason, which was provided for in the first section. If any person shall incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to any such existing rebellion or insurrection," &c. In the sixth clause of the fifth section it provides, in reference to this same subject, the forfeiture of property, as follows: 'If any person who, owing property in any loyal State or Territory, &c., shall hereafter assist and give aid and comfort to such rebellion, such property shall be subject to seizure and forfeiture.' The sixth section further provides that if any person other than those previously named, being engaged in armed rebellion against the Government of the United States, or aiding or abetting such rebellion, shall not, after proclamation by the President, cease to aid, countenance and abet such rebellion, and return to his allegiance to the United States, all his property should be liable to seizure and forfeiture.

"The seventh section of the same act made provision for libeling such property so seized in various courts of the United States; and after directing that the proceedings should conform as nearly as may be to proceedings in admiralty or revenue cases, it enacts:

"'And if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemy's property, and become the property of the United States,' &c.

"Other provisions of this act might be cited to show that these words have been used by Congress in relation to property, and in a different sense from that in which the same

or nearly identical words are used in the Constitution and laws of the United States to define the crime of treason and prescribe its punishment."

And in Knoefel *v.* Williams, 30 Indiana R., 5, it is pointedly said: "It is argued that this act is an act for the punishment of treason, and that it deprives the person implicated of a trial before the punishment. But we apprehend that confiscation acts stand on a much broader basis."

It is, therefore, very evident that the acts specified in the statute which give rise to confiscation of property are placed on a different footing from that of treason. For the property of "any person," a foreigner, who could not be guilty of treason, as well as that of a citizen, might be forfeited for accepting or holding any of the offices or positions specified in the act.

Property, therefore, is *not* forfeited under the act, as a punishment for treason, but for disobedience to the mandate of the law prohibiting any and every one from *thereafter* acting in any one of the capacities specified in the 5th section, and the failure of parties to comply with the provisions of the 6th section of the act, requiring all parties to cease to aid, countenance, and abet the rebellion, and to return, within the specified time, to their allegiance, and is therefore legal and constitutional, even if the power of Congress to punish treason was limited by the Constitution.

The act, as its title imports, embraces a variety of different and distinct objects. It is entitled: "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." It is, therefore, an act to suppress insurrection. It is an act to punish treason and rebellion. It is an act to seize and confiscate the property of rebels. And it is also an act for other purposes. Each and every one of these objects might

have been embraced in a separate and distinct law. But these provisions are none the less distinct laws, and none the less relate to different matters, and none the less governed by different rules, because they are all embodied in one and the same act. There is nothing in the Constitution of the United States similar to the provision in the constitutions of some of the individual States, requiring the object of every law to be expressed in its title, and to relate to but one subject. And there is no doubt but that it is from some one or more of these sources that the idea came that the act of 1862 was an act solely for the punishment of treason. The Congress of the United States, however, looks to no such sources for authority for its laws. It is left perfectly free and unfettered by the Constitution, as to including one or more subjects in an act. It may or may not, just as it pleases, include one or more subjects in a law. Who does not recollect the celebrated Omnibus Bill of Mr. Clay, in 1850, which related to various subjects: to the Texas boundary; to the admission of California as a State in the Union; to the establishment of territorial governments for Utah and New Mexico, and to other objects?

Did any one of the great and glorious men of that day (such as the God-like Webster, the great expounder and defender of the Constitution) think that that bill related to but one object, or that there was any objection to the validity of the same because it embraced and included different and distinct subjects? Certainly not.

And we must be permitted to say that no one but those in pursuit of an impracticable theory could ever have supposed that the act of 1862 was an act solely for the punishment of treason.

But it has been said "the very title of the law shows that it is a penal statute; it is entitled 'An act to suppress in-

surrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.'" "Is it not, then, clear that the main object of the law, thus declared by its title, is the punishment of treason and rebellion?" *I answer, no! The main object of the statute is to suppress insurrection;* the punishment of treason and rebellion, and the seizure and confiscation of the property of rebels, &c., *are but the means to suppress insurrection.*

The confiscations under the act were not claimed as punishments for the crime of treason. But they rest upon the provisions of the fifth and sixth sections of the act. The fifth section paescribes confiscation of property for "*any* person" (citizen or *foreigner*) *thereafter* acting as an officer of the army or navy of the rebels, or as President, Vice President, member of Congress, judge of any court, cabinet officer, &c., of the so-called Confederate States. And the sixth section reads as follows: "That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the Government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, money, stocks, and credits of such person shall be liable to seizure as aforesaid; and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof."

And the mode of proceeding rests on the seventh section of the same act, which provides: "That to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for

the purposes aforesaid," (that of the support of the army,) "proceedings *in rem* shall be instituted in the name of the United States in any district court," &c.

Now, these provisions show very clearly that it is not as a punishment for the crime of treason that the property was forfeited, but it was because the party failed to obey the mandate of the law providing that if "*any person*" should *thereafter* act in any of the capacities specified in the fifth section, that their property should be liable to seizure, &c.; and under the sixth section of the act requiring every person therein referred to "to cease to aid, countenance, and abet such rebellion, and to return to his allegiance to the United States."

It was, therefore, the fact of a party having acted in contravention of the statute in one or more of the capacities named, or the failure of the party to return to his allegiance, upon which the forfeiture and confiscation is based. Treason had already been provided for, and the penalty for the same had been prescribed in the first section of the act, (12 U. S. Stat., 589, 590,) as follows: "That every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free; or, at the discretion of the court, he shall be imprisoned for not less than five years, and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and made free; said fine shall be levied and collected on any or all of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding." And for any treason committed before the passage of the act of 1862, it is provided, by the fourth section of that act, that a party

might be prosecuted under any former law, unless convicted under the act of 1862. Now, under the former law, the only penalty for treason was death.

It is, therefore, manifest that confiscation under the other sections of the act was not designed as a punishment for *treason*. The object of these sections of the act was to deter "any person" (foreigners as well as citizens) from thereafter acting in any one of the specified capacities, and to compel every one to return to his allegiance to the Government, and it was because of the party acting contrary to the provisions of the statute, or his failure to return to his allegiance, that his property was forfeited. And the law is well settled that there may be a forfeiture under a statute for non-feasance, as well as for misfeasance. 7 Co., 36; 11 Co., 68; 8 Bouv. Bac. Ab., 44; Moor, 238. In Pennsylvania, parties during the Revolution, under a statute of that State, forfeited their property because they failed to return, as required by law, to the State and stand their trial for treason. 3 Watts & Serg. R., 510. So in Massachusetts, parties forfeited their property by remaining abroad after having been required by statute to return. 1 Mass. R., 385; 4 Mass., 282; 15 Mass., 44. And this was *not* regarded as a punishment for treason, but as a penalty by reason of their failure to return to the State as commanded by the law. 1 Mass. R., 385, 386; 2 J. R., 260.

And in McIlvaine *v.* Coxe's Lessee, 4 Cranch, 209, the Supreme Court of the United States, with reference to the confiscation acts of New Jersey, and those who had failed to comply with the requirements of the same, said: "They are pronounced guilty of high treason, not for the purpose of affecting them personally, which would have been most unjust, but with a view to the confiscation of their estates."

So, under the act of 1862, parties are prohibited from

accepting positions and holding offices, and all persons concerned in the rebellion are required to return to their allegiance within a certain time; and on their failure so to do, it is declared in the act that their property should be liable to seizure and confiscation. This is a proper and legitimate exercise of power on the part of Congress, even if it should be regarded as an act merely of sovereign authority.

"Punishments" (says Bowyer in his Commentaries on Universal Public Law, 180) "are of natural law and *juris gentium*, though the form in which the right of punishing offences exists in civil society is given by municipal law." And the reason of this is that in civil society the right to punish is an attribute of sovereignty. In the case of McCulloch *v.* State of Maryland, 4 Wheat., 416, Chief Justice Marshall, in speaking of the power of the Government to punish in cases not prescribed by the Constitution, says: "All admit that the Government may legitimately punish any violation of its laws, and yet this not among the enumerated powers of Congress." And at page 418 this same eminent Chief Justice, after giving some striking illustrations of the implied power of the right of the Government to punish any violation of its laws, and after stating that "this right is indeed essential to the beneficial exercise of the power," (that is any given power under the Constitution,) "but not indispensably necessary to its existence," or to the exercise of the power, though no punishments should be inflicted for the violation of the laws prescribed, says: "The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as an incident to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right inci-

entald to the power, and conducive to its beneficial exercise."

So the good sense of the public, as well as the courts, have pronounced the act of 1862 constitutional. It but required a reasonable duty from those to whom it was addressed; that is, not to accept any position or office under the confederacy, and to return to their allegiance within a reasonable time, and, in default of so doing, it provided for the seizure and condemnation of their property. This is legitimate. This is legal and constitutional.

Nor will it be of any validity or force against the correctness of this position to say that the law is addressed to those who were not personally amenable to such law. For it has been settled by the solemn judgment of the House of Lords, in England, that the prohibitory laws of a country may follow its subjects wherever they go, so that acts done by them in foreign parts are affected by those laws. Sussex Peerage Case, 11 Cl. & Fin., 85, 146.

By the law of England, if the Crown sends a writ to any subject when abroad, commanding his return to the realm, and if he fails or neglects so to do, it is deemed a high contempt of the royal prerogative, and for which the offender's lands are liable to be seized till he return, and then he is liable to fine and imprisonment. 1 Bl. Com., 265, 266; 1 Hawk. P. C., 22.

Bowyer, 181, 182, says: "Every State may, therefore, absolutely forbid its subjects to do any given thing, wherever they may be, provided it do not enforce that prohibition by any act of jurisdiction exercised out of its own territories, and within those of another State. And the subject so offending may be compelled to return home, or punished on his contumaciously remaining abroad, by process against his property situated in his own country." And the im-

movable property even of foreigners "may be liable to forfeiture, or other process of law, for offences against the laws of the country where it is situated, in the same manner as it would be if possessed by subjects of that State."

In whatever light, then, we may view those engaged in the rebellion, (even if viewed as citizens, merely, and not as enemies,) the act authorizing the seizure and condemnation of their property, for their disobedience and failure to cease to aid, countenance, and abet the rebellion, and return to their allegiance within the prescribed time, cannot but be considered as a legitimate and constitutional exercise of power by Congress.

The legislative department of the Government has the exclusive right to say what shall be done, and what left undone, and, in order to secure obedience to the law, to prescribe forfeiture of property as the penalty for doing or not doing the act required by the law-making power. The right to forfeit is but an incident to the power to punish for a violation of the law. And without the violation of the act of 1862, no forfeiture could have been incurred. But when the law is violated, justice demands, and the interests of society and government require, that the majesty of the law should be vindicated by the enforcement of its provisions against offenders. "One of the incidents of society is self-protection," (37 Me. R., 161,) and this protection can only be had by the strict enforcement of such wise and salutary laws as the legislative department of the Government may from time to time ordain and establish. We, therefore, think that the provisions of the act of 1862 (even as an ordinary act of legislation) are legal and constitutional, and not a confiscation of property for treason.

A different view, however, was taken of this matter in Norris *v.* Doniphan, 4 Met., (Ky.,) R., 385. But as the

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By the law of England, if the Crown sends a writ to any subject when abroad, commanding his return to the realm, and if he fails or neglects so to do, it is deemed a high contempt of the royal prerogative, and for which the offender's lands are liable to be seized till he return, and then he is liable to fine and imprisonment. 1 Bl. Com., 265, 266; 1 Hawk. P. C., 22.

Bowyer, 181, 182, says: "Every State may, therefore, absolutely forbid its subjects to do any given thing, wherever they may be, provided it do not enforce that prohibition by any act of jurisdiction exercised out of its own territories, and within those of another State. And the subject so offending may be compelled to return home, or punished on his contumaciously remaining abroad, by process against his property situated in his own country." And the im-

movable property even of foreigners "may be liable to forfeiture, or other process of law, for offences against the laws of the country where it is situated, in the same manner as it would be if possessed by subjects of that State."

In whatever light, then, we may view those engaged in the rebellion, (even if viewed as citizens, merely, and not as enemies,) the act authorizing the seizure and condemnation of their property, for their disobedience and failure to cease to aid, countenance, and abet the rebellion, and return to their allegiance within the prescribed time, cannot but be considered as a legitimate and constitutional exercise of power by Congress.

The legislative department of the Government has the exclusive right to say what shall be done, and what left undone, and, in order to secure obedience to the law, to prescribe forfeiture of property as the penalty for doing or not doing the act required by the law-making power. The right to forfeit is but an incident to the power to punish for a violation of the law. And without the violation of the act of 1862, no forfeiture could have been incurred. But when the law is violated, justice demands, and the interests of society and government require, that the majesty of the law should be vindicated by the enforcement of its provisions against offenders. "One of the incidents of society is self-protection," (37 Me. R., 161,) and this protection can only be had by the strict enforcement of such wise and salutary laws as the legislative department of the Government may from time to time ordain and establish. We, therefore, think that the provisions of the act of 1862 (even as an ordinary act of legislation) are legal and constitutional, and not a confiscation of property for treason.

A different view, however, was taken of this matter in Norris *v.* Doniphan, 4 Met., (Ky.,) R., 385. But as the

decision in that case was based on the *erroneous* supposition that the Government did not possess the same right to confiscate property in a civil war which it had in a foreign or public war, it cannot be regarded as authority, as it is now conclusively settled by the decision of the Supreme Court of the United States in the Prize Cases, 2 Black, that the Government *does* possess the same rights in a civil war which it has in a foreign or public one.

In the Amy Warick, 2 Sprague, 141, it is said: "The owner may, by certain acts, have subjected his property to be treated as enemies', and by other distinct acts committed the crime of treason."

And again, Judge Sprague, in the above case, unanswerably says: "Suppose there should be one act, which is such a use of property as subjects it to confiscation, and at the same time constitutes an overt act of treason; and suppose, further, that the Government cannot proceed for both penalties, yet they may elect. They are not bound to prosecute for the crime; and if they enforce the forfeiture, the most that can be said is, that they are thereby precluded from subsequently having a conviction for the treason."

ENEMIES' PROPERTY.

III. *Property under the Act was confiscated as "enemies' property."*

The forfeiture was neither for *treason* nor as a *punishment* for being engaged in rebellion or aiding and abetting the same. But the confiscation proceeded on the ground that it was "enemies' property," and in this view of the matter it is *unquestionably* free from all constitutional objection and a valid exercise of power.

The act in providing for the condemnation of property

expressly says: "It shall be condemned as enemies' property."

This emphatic language is mandatory to the courts, and left them no discretion in the matter.

They could only proceed against and deal with the property seized as enemies' property. And they could deal with it in no other way or manner whatever under the act.

For it is for the political department of the Government to determine the status of parties. Borden et al *vs.* Luther, 7 How., 1; Gelston *vs.* Hoyt, 3 Wheat., 246, 324; The Santissima Trinidad, 7 Wheat., 337; Rose *vs.* Himely, 4 Cranch, 272; United States *vs.* Palmer, 3 Wheat., 610, 634; 2 Black's R., 670; 9 How., 603; 16 How., 164.

And as the President, in pursuance of the power vested in him for that purpose, (12 U. S. Stat., 257, § 5; ib. 284, ch. 32,) proclaimed certain named States to be in insurrection and rebellion, this fixed their *status*, and the courts were bound to consider that *status* as continuing until it was otherwise recognized and declared by the proper department of the Government.

And we find, consequently, that the courts have uniformly *held*, that all the inhabitants of the States so proclaimed in insurrection and rebellion were, so far as belligerent rights were concerned, to be regarded and considered as enemies, and their property accordingly condemned as "enemies' property."

"But," (as is well said in the Prize Cases, 2 Black's R., 674,) "in defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.' It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the Common Law."

And again, in the above cases, pages 672, 673, 670, 674, it is said:

"The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the Common Law, which says, 'that persons who wage war against the king may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies.'

"They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its 'de *facto* government' to submit to their laws and assist in their scheme of revolution; that the acts of the usurping Government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the Government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the Government, by treasonably resisting its laws.

"*They contend*, also, that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law; that confiscation of their property can be effected only under a municipal law; that by the law of the land, such confiscation cannot take place without the conviction of the owner of some offence; and finally, that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the National Government, and consequently that the Constitution and Laws of the United States are still

operative over persons in all the States for punishment as well as protection.

"This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battlefield or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is '*unconstitutional!*'

"The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors;* and a war levied on the Government by traitors, in order to dismember and destroy it, is not a *war* because it is an 'insurrection.'

"All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."

In the case of the Venice, 2 Wallace's R., 258, 274–5,

Chief Justice Chase, in giving the unanimous opinion of the Supreme Court of the United States, says: "The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government, and of all citizens or subjects of the other, applies equally to civil and to international wars.* Either belligerent may modify or limit its operation as to persons or territory of the other; but in the absence of such modification or restriction, judicial tribunals cannot discriminate in its application."

Again, in the case of Mrs. Alexander's Cotton, 2 Wallace's R., 404, 419, the Chief Justice says: "It is said, that though remaining in rebel territory, Mrs. Alexander had no personal sympathy with the rebel cause, and that her property, therefore, cannot be regarded as enemy property; but the court cannot inquire into the personal character and disposition of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies, until, by the action of the legislature and the Executive, or otherwise, that relation is thoroughly and permanently changed."

And in the later case of The Peterhoff, 5 Wallace's R., 28, 60, Chief Justice Chase, in again delivering the *unanimous* opinion of the court, said: "It has been held by this court that persons residing in the rebel States at any time during the civil war must be regarded as enemies during such residence, without regard to their personal sentiments or dispositions."† See also 5 Wall., 369, 405, 407, 408, 409.

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* Prize Cases, 2 Black's R., 666; concurred in by dissenting judges, ib. 687-8.

† Prize Cases, 2 Black, 666, 687-8; The Venice, 2 Wallace, 258; Mrs. Alexander's cotton, ib., 404.

All the inhabitants, then, of the seceded States being, in law, enemies of the United States, the latter had a perfect right to resort to the belligerent right of confiscation ; for it is a proposition never doubted, that a sovereign endeavoring to reduce his revolted subjects to obedience, possesses both sovereign and belligerent rights. He may exercise one or both at his option ; and the character of the act will determine in which capacity the act is performed. Marshall, C. J., in Rose *v.* Himley, 4 Cranch R., 272–3 ; Prize Cases, 2 Black, 673.

The Government, therefore, possessing both sovereign and belligerent rights against the revolted States and their inhabitants, the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, and to seize and confiscate the property of rebels, and for other purposes," must be regarded as an exercise of both sovereign and belligerent rights. And being so regarded, there can be no doubt whatever but that all the seizures and condemnations of property provided for in the different sections of the act are to be regarded as made in the exercise of belligerent rights. The first section of the act prescribes the punishment for treason. And the second section provides the punishment for aiding, countenancing, or abetting the rebellion. These provisions in the first and second sections of the act are clearly to be regarded as an exercise of sovereign authority.

But all the subsequent provisions of the act relating to the seizure and condemnation of property are manifestly to be referred to the belligerent right of confiscation. For in the fifth section it is made the duty of the President, in order "to insure the speedy termination of the present rebellion," "to cause the seizure of all the property," &c., of the parties named in that as well as the sixth section, "and to apply and use the same and the proceeds thereof for the support of the army of the United States."

This is but the exercise of the belligerent right of confiscation, as all the parties whose property was to be seized are spoken of as being in some way connected with the rebellion, "and are none the less enemies because they are traitors." 2 Black, 674. They were, then, not only enemies in law, but enemies in fact, and their property, therefore, subject to the belligerent right of confiscation for the support of the army.

For, as is well said by Chief Justice Marshall in Rose *v.* Himley, 4 Cranch, 241, 272–3, with reference to a sovereign who was endeavoring to reduce his revolted subjects to obedience, possessing both sovereign and belligerent rights, and to be capable of acting in either character, "the manner in which he acts must determine the character of the act. If, as legislator, he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law, and of the proceedings under it, will decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; whether the court, in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations."

As the manner, then, in which the Government acts must determine the character of the act, we think there can be no doubt that the seizures and condemnation as "*enemies' property,*" provided for in the act, are to be regarded as an exercise solely of the belligerent right of confiscating "*enemies' property.*" The owners of the property condemned were by the act, so far as respected property, put upon the footing of enemies, and treated accordingly. This is all the act means with reference to confiscating property, and all that it was intended to mean.

In the case of the United States *vs.* Stock, 5 Blatchford's C. C. R., 237, Mr. Justice Nelson, with reference to the

nature and character of the acts of August 6, 1861, and seventeenth July, 1862, says: "These acts provide for the seizure of enemies' property, as prize of war, on land, *jure belli*, which, according to the case of Brown *vs.* The United States, (8 Cranch, 110,) is not authorized by the law of nations, and can be upheld only by an act of Congress; in other words, by the municipal law of the nation seeking to enforce the forfeiture. The law of nations authorizes captures, as prize of war, on the high seas; the acts of Congress on the land; and in the latter case these acts expressly provide that the proceedings shall conform to the proceedings in admiralty and revenue cases, and that if the property is found to belong to a person engaged in the rebellion, it shall be condemned as enemies' property. These acts of Congress are but an extension of the rule which, according to international law, has always been applied, *jure belli*, to enemies' property."

Even the property of a loyal and peaceful citizen, taken trading with the enemy, "is forfeited as prize." Jecker *vs.* Montgomery, 18 How., 114. And "the ground of the forfeiture is that it is taken adhering to the enemy, and, therefore, the proprietor is *pro hac vice* to be considered as an enemy." *Ib.*

And it was held in the case of the Rapid, 8 Cranch, 155, that after a declaration of war an American citizen could not lawfully send a vessel to the enemy's country to bring away his property, as the law will not tolerate intercourse even for such a purpose. "The whole nation," says the court in the above case, "are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country."

And all the inhabitants of enemy territory, as we have seen, are to be regarded as enemies, and their property, irrespective of their sentiments and feelings, (2 Wallace, 60; ib., 404,) liable to capture and confiscation, except in so far as that relation and exemption may have been changed by the Government itself. Mrs. Alexander's cotton, 2 Wallace, 404.

How much more justifiable, then, that the property of those who are not only enemies in law, but enemies in fact, should be subjected to the belligerent right of confiscation, and condemned in accordance with the requirements of the act as "*enemies' property.*"

And this legislation was only necessary to enable the courts so to condemn the property and give effect to the will of the nation. Brown *vs.* The United States, 8 Cranch, 110.

WAR RIGHT.

IV. *War gives the right to confiscate "enemies' property."*

The right to confiscate the property of an enemy is a *war* right. Ware, Adm., *vs.* Hylton, et al., 3 Dall., 227, 199; Cooper *vs.* Telfair, 4 Dall., 14; The Venus, 8 Cranch R, 253; Thompson *vs.* Carr, 5 N. Hamp., 510, 515; Brown *vs.* United States, 8 Cranch R., 125, 122, 123; Norris *vs.* Doniphan, 4 Met, (Ky.) R. 385. All the acts of confiscation passed by the different States during the Revolution have uniformly been considered as valid and justified by a state of war. 1 Day's R., 4; Sleight *vs.* Kane, 2 J. Ca., 236, 237; McNeil *vs.* Bright, 4 Mass. R., 282, 304; Gilbert et al. *vs* Bell, 15 Mass. 44; 5 Cranch, 353 n; Smith *vs.* Maryland, 6 Cranch, 286; Asherton *vs.* Johnston, 2 N. Hamp., 31.

"The right to confiscate the property of enemies" (says Mr. Justice Chase, 3 Dall., 227) "during war, is derived

from *a state of war*, and is called the *rights of war*. This right originates from *self-preservation*, and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. *Justice*, also, is another pillar on which it may rest, to wit: a right to reimburse the expenses of an unjust war." In Brown *vs.* The United States, 8 Cranch, 122–123, Chief Justice Marshall, in delivering the opinion of the court, says: "Respecting the power of the Government no doubt is entertained. That war gives to the sovereign full right to take the possessions and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authorities shall choose to bring it into operation, the judicial department must give effect to its will." And, in this same case, at page 125, Chief Justice Marshall further says: "It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not of itself confiscate the property of the enemy."

Chancellor Kent, in speaking in reference to this subject, has said: "But however strong the current of authority in favor of the modern and milder construction of the rule of international law on this subject, the point seems to be no longer open for discussion in this country; and it has become definitely settled, in favor of the ancient and sterner rule, by the Supreme Court of the United States." 1 Kent's Com., 69, 10th ed., side p. 59.

In Thompson *vs.* Carr, 5 N. Hamp., 515, Richardson, Chief Justice, states the law as follows: "The right to confiscate the property of an enemy, during a war, is derived from a state of war. The right originates in the principle of self-

preservation, and is in substance the same as the right of capture."

Martens, in his summary of the Law of Nations, (book 8, chap. 3, sec. 9,) says: "The conqueror has a right to seize on the property of the enemy, whether movable or immovable. These seizures may be made, first, in order to obtain what he demands as his due or equivalent; secondly, to defray the expenses of the war; thirdly, to force the enemy to equitable peace; fourthly, to deter him, or by reducing his strength, to hinder him from repeating in future the injuries which have been the cause of the war."

Grotius, too, (book 3, chap. 6,) recognizes the right of confiscation in the most unqualified manner.

"A State taking up arms," (says Vattel, book 3, chap. 9, sections 160, 161,) "has a right to weaken her enemy, in order to render him incapable of supporting his unjust violence, a right to deprive him of the means of resistance. Hence, as from this source originate all the rights which war gives us over things belonging to the enemy, we have a right to deprive him of his possessions, of everything which may augment his strength, and enable him to make war. This every one endeavors to accomplish in the manner most suitable to him. Whenever we have an opportunity, we seize on the enemy's property and convert it to our own use; and thus, besides diminishing the enemy's power, we augment our own, and obtain at least a partial indemnification or equivalent either for what constitutes the subject of the war, or for the expenses and losses incurred in its prosecution; in a word, we do ourselves justice."

And Bynkershoek, whom Marshall, C. J., in 7 Cranch, 144, says is "a jurist of great reputation," in his treatise on the Law of War, (chap. 7, p. 51, Dup. Tr.,) uses this clear and forcible language: "And surely, such being the

state of war, that enemies are on every legal principle proscribed and despoiled of everything, it stands to reason that everything belonging to the enemy, which is found in the hostile country, changes its owner and belongs to the *fisk*."

"If we follow the strict law of war, even immovables may be sold, and their proceeds be lodged in the public treasury, as is done with movables."

And Manning, a late author on the Law of Nations, (p. 136,) in speaking in reference to the right to confiscate private property on land, is thus explicit: "It is still liable to seizure under circumstances constituting in themselves a necessity, of which the conqueror is the judge."

In commenting on the case of the Emulous, (1 Gall., 563,) Chancellor Kent said: "When the case was brought up on appeal before the Supreme Court of the United States, the broad principle was assumed that war gave to the sovereign full right to take the person and confiscate the property of the enemy wherever found; and that the mitigation of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself." "Though this decision established the right, contrary to much of modern authority and practice, yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right to depend upon a special act of Congress." 1 Kent's Com., 69–70, 10th ed.

The right, then, to confiscate under the act of 1862 is clear and unquestionable, and much, if not all modern objection to confiscation, is swept away by the act. At all events, no power on earth can now question the exercise of the right.

For, as is well said by Chief Justice Marshall, (Schooner

Exch. *vs.* McFaddon, 7 Cranch, 136,) "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute."

Judge Story, too, in the case of the Emulous, 1 Gall. R., 575-6, has well said: "It seems conceded, and, indeed, is quite too clear for argument, that in former times the right to confiscate debts was admitted as a doctrine of international law. It had the countenance of the civil law, of Grotius, of Puffendorf, and lastly of Bynkershoek, who is himself of the highest authority, and pronounces his opinion in the most explicit manner. Down to the year 1737 it may be considered as the opinion of jurists that the right was unquestionable. It is, then, incumbent on those who assume a different doctrine to prove that since that period it has, by the general consent of nations, become incorporated into the code of public law. I take upon me to say that no jurist of reputation can be found who has denied the right of confiscation of enemies' debts."

And, after remarking that Vattel had been supposed to be most favorable to the new doctrine, and after stating positively that even he did not deny the right of confiscation, this same eminent author and judge uses this positive and emphatic language in reference to Vattel: "But if he is singly to be opposed to the weight of Grotius and Puffendorf, and, above all, Bynkershoek, it will be difficult for him to sustain so unequal a contest." Ib., 575. Nor is there anything in the subsequent opinion of the Supreme Court in this same case that in the least conflicts with the views above expressed; but, on the contrary, the right to confiscate, whenever Congress should see fit so to do by legislative enactment, was unqualifiedly admitted.

In commenting on the remarks of an able and distinguished statesman, who had said that the right to confiscate had not

been used for some considerable time, Judge Story (1 Gall. R., 577–8) thus gives his answer to that position: "It is supposed by the same learned writer that the principle of confiscating debts had been abandoned for more than a century. That the practice was intermitted is certainly no very clear proof of an abandonment of the principle. Motives of policy and the general interests of commerce may combine to induce a nation not to enforce its strict rights, but it ought not, therefore, to be construed to release them. It may, however, be well doubted if the practice is quite so uniform as it is supposed. The case of the Silesian loan, which exercised the highest talents of the English nation, is an instance to the contrary, almost within a half century."

To this able and unanswerable exposition of the law may be added the modern usage of many of the States during the Revolution, and whose acts stand confirmed by the solemn judgments of every court which has ever been called upon to pronounce upon the validity of those acts of confiscation. And it is well said by Sedgwick, J., in Martin *v.* Com. *et al.*, 1 Mass. R., 385, in reference to the property of those who adhered to the British Crown: "It might not be converted by the owner into means of offence; it might justly be seized by the community for its own defence and security." So the property of rebels and traitors may not be converted by the owners into means of offence; it may justly be seized and condemned as provided in the act, and the proceeds used for the support of the army.

No authority of ancient or modern times has denied the right of a belligerent to confiscate the property of the enemy. But it has been said, substantially, that the property of private individuals ought not to be taken, because the people may have been compelled by their sovereign to engage in a war to which they were opposed, and that, therefore, it

would not be just to punish them with a confiscation of their property for the acts of their sovereign, which they could not prevent. Whatever may be the force of this mode of reasoning in regard to the subjects of absolute and despotic governments, it certainly can have no application whatever to a civil war of the description in which we were recently engaged. In arbitrary governments sovereignty is said to reside in the king. In England it is vested in the Crown, Lords and Commons. But in this country our theory of government is that every citizen is a freeman, and that sovereignty resides in the great body of the people, and not in the Government. If then, as all admit, the property of one sovereign may be confiscated in war, why may not the property of all the sovereigns who conjointly inaugurate civil war be confiscated by the victorious party? The principle that would warrant confiscation in the one case would also warrant it in the other. The late war was a war of all the people engaged in the same against the Government, and the act only contemplates the confiscation of the property of those who failed to cease to aid, countenance and abet the rebellion, and return to their allegiance within the prescribed time. There is no analogy, then, in the cases that are put for exempting private property from confiscation and the one under consideration. Nor is there any force in the further reason that is sometimes given for exempting private property of an enemy situated in the country from confiscation. The reason, in substance, assigned for such exemption is that inasmuch as the party had been permitted by the Government to acquire property within the same, it is presumed that it was acquired with the tacit, or implied, understanding that in case of war between the Government of the owner and that of the country in which the property is sit-

uate, it would not be confiscated. See Wheat. Int. L., (Law. ed.,) 528.

A reason of this kind, it is evident, could have no application whatever to a civil war. The parties making the war, in such case, did not acquire their property on any such condition as that of which we have spoken. They acquired their property as citizens of the country in which it is situate, and it would be an absurdity to suppose that there was any tacit or implied understanding between them and the Government that in case they made war on the same, that their property should not be confiscated. And so the property of any foreign subject aiding rebellion may be justly confiscated, without at all conflicting with the principle upon which it is sought to exempt private property situate in a country from confiscation. In the case put there would be no war between the Government and that of such foreign owner. The reason for the rule of exemption, then, can have no application, and as the reason of the rule fails, of course, the rule itself must fail. For it would be a monstrous absurdity to suppose that there ever was, or could be, any understanding of any kind between a foreigner and the Government in which he was permitted to acquire property, that it would not confiscate his property in case he, as an individual, joined in a rebellion to subvert and overthrow the Government. One so acting certainly could not be on any better footing than that of the citizens engaged in the rebellion.

But the right of the Government to confiscate every kind of enemy property is established beyond the possibility of a doubt. And this is fully warranted not only by the foregoing authorities, but by the broad and unrestricted language of our distinguished countryman, Mr. Wheaton, as follows: "It is competent for the national authority to work a trans-

mutation, total or partial, of the property belonging to the vanquished party; and if actually confiscated, the fact must be taken for right. But to work such a transfer of proprietary rights, some positive and unequivocal act of confiscation it essential." Wheat. Int. L., (Law ed.,) 55, chap. 2, § 11.

For the right to confiscate is but the belligerent right of capture.

And our late civil war was a public one on the part of the Government, and a private one on the part of the insurgents, or rebels. Polson's Int. L., 40, 1st Am. ed.; Wheat. Int. L., (Law ed.,) 520–1.

"When a party is formed in a State" (says Vattel, Droit des Gens, liv. III, ch. 18, § 292) "who no longer obey the sovereign, and are possessed of sufficient strength to oppose him—or where, in a republic, the nation is divided into two opposite factions, and both sides take up arms—this is called a *civil war*." "Custom appropriates the term '*civil war*' to every war between the members of one and the same political society."

Bello has said: "When a faction is formed in a State, which takes up arms against the sovereign, in order to wrest from him the supreme power, or impose conditions on him—or, when a republic is divided into two parties which mutually treat each other as enemies—this war is called *civil war*, which means war between fellow-citizens." See Wheat. Int. L., (Law. ed.,) 524, in note.

And Polson, in his principles of the Law of Nations, p. 40, 1st Am. ed., says: "A civil war is a war between members of the same state, and, according to Grotius, is a *public* war as far as the Government is concerned, and *private* on the part of the insurgents."

Such, then, being the nature and character of civil war,

of course all belligerent rights attach to the same, just as though it were a war between two independent nations.

Vattel, (Droit des Gens, liv. III, ch. 18, §§ 293-4,) in speaking on this subject, says: "A civil war breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. They stand, therefore, in precisely the same predicament as two nations who engage in a contest, and, being unable to come to an agreement, have recourse to arms. This being the case, it is very evident the common laws of war ought to be observed by both parties in every civil war."

And Grotius, in his great work, recognizes the fact that civil war is a mixed war, public on the side of the Government, and private on the part of the people resisting its authority, and gives belligerent rights against the rebels and other nations aiding them.

Mr. Wheaton (Int. L., 520-2, Law. Ed.) says: "A civil war between the different members of the same society is what Grotius calls a *mixed* war; it is, according to him, *public* on the side of the established Government, and *private* on the part of those resisting its authority. But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations."

In the case of Rose *vs.* Himely, 4 Cranch, 272, it is admitted that a sovereign who is endeavoring to reduce his revolted subjects to obedience, possesses both sovereign and belligerent rights. And this decision has been held to be authoritative. 13 J. R., 587.

The doctrine is fully recognized in The United States *vs.*

Palmer, 3 Wheat , 635; and in the Divina Pastora, 4 Wheat., 52.

Mr. Justice Story, in speaking of the civil war between Spain and her revolted South American colonies, and of the rights of the Government and the rebels, said: "Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights." The Santissima Trinidad, 7 Wheat., 337.

"When * * * * *civil war exists,*" (says the court in the Prize Cases, 2 Black, 667–8,) "hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."

"Congress has as much power to 'suppress insurrections' as to 'repel invasions,' and resort may be had to any means known and recognized by the laws of war." 30 Indiana R., 5.

The Government, then, has all the rights of a belligerent, and may take and confiscate the property of the enemy wherever its flag flies in the enemy's country. It is but the exercise of a belligerent right. "The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure and destruction of his property, is a necessary result of a state of war." Prize Cases, 2 Black's R., 671. See also 9 How., 616; 16 How., 140, 143, 196, 201.

CONFISCATION CONSTITUTIONAL.

V. *The Right to Confiscate is not only a War Right, but a Constitutional Right.*

By sect. 8, paragraphs 1, 11, 12, 13 and 18, Art. I of the Constitution, Congress has power to provide for the common defence and general welfare of the United States; to

declare war, make rules concerning captures on land and water, to raise and support armies, to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion, to make all laws which shall be necessary (and this is not by way of restriction, but an enlargement of those powers, 4 Wheat., 419-20) and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

These are as broad and comprehensive grants of power as it is possible for language to convey, and where power is given to Congress to do any act it may select, and use all legitimate means that it deems fit and proper to effect that object. Fisher *vs.* Blight, 2 Cranch, 358, 396; McCulloch *vs.* State of Maryland, 4 Wheat., 316, 419, 420, 421; 18 How., 281.

In Fisher *vs.* Blight, 2 Cranch, 358, 396, Chief Justice Marshall says: "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." And in the great case of McCulloch *vs.* The State of Maryland, 4 Wheat., 421, this same eminent Chief Justice says:

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the Constitution, and

all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Let the act of 1862, then, be considered as a war measure adopted by Congress for the purpose of suppressing *insurrection and rebellion*, and every objection to the same must vanish. For war gives rights which no one may deny. In the case of Johnson *vs.* McIntosh, 8 Wheat., 588–9, Chief Justice Marshall has well said: "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim, which has been successfully asserted." "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits." See 9 How., 615, 618.

The war right under the Constitution, as well as the Law of Nations, is the paramount and supreme law so long as the war lasts. All other rights, if such there be, which are in conflict or inconsistent with the rights of war, may justly be said to be in a state of suspended animation during the existence of the war. How, then, can the right of confiscation, as provided in the act, be denied, or deemed unconstitutional?

But it has been said that the war power is dangerous to liberty, and that Congress has no warrant in the Constitution for the exercise of such an undefined and unrestricted power.

The exercise of the war power may be dangerous to rebels and traitors, but it is none the less a legal and constitutional power. Who but rebels and traitors call forth and give vitality to this most extraordinary and unlimited of powers? And who but the same description of persons prolong its existence? Is it not a power that will lapse into repose as

soon as the rebellion is crushed? Most assuredly it is. But as long as treason and rebellion flourish, it is not only the right, but the duty of the Government to avail itself of all the rights which war gives, as well as every power which the Constitution confers.

Admit that the Congress cannot declare war against a State of the Union, yet when one or more States inaugurate a state of civil war upon the Government, it cannot, without ceasing to fulfil its high destiny under the Constitution, decline the gage of battle thus thrown down. The Government does not, in such case, declare and make the war. On the contrary, it but *repels* the war that is made upon itself, and as long as the same shall last, so long must the Government be its own judge of the mode and measure of redress.

It is for Congress to say what rights of war shall be enforced, and for the President, as commander-in-chief, to conduct the operations of war according to the best of his judgment and ability. They are the sole and only judges as to what means are necessary and shall be used in the prosecution of the war, in order to bring the same to a successful termination. Their discretion in war is above and beyond the control of all earthly power, and all their acts in relation to war are valid and legal when not expressly prohibited by the Constitution.

In the case of McCulloch *v.* The State of Maryland, 4 Wheat., 423, Chief Justice Marshall (even in regard to peace legislation) says: "But where the law is not prohibited, and is really calculated to affect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such power." See also 3 Wheat., 634-5.

So the courts must disclaim all right to judge of the necessity of the provisions of the act of 1862. The question is not whether it was wise or unwise, necessary or unnecessary; but the sole and only question is, does it come within the legitimate and constitutional power of Congress? If it be legitimate and constitutional, the courts can have nothing to do but to execute the law. In no case is the court responsible for any supposed, imaginary, or real consequences that might flow from the execution of the statute.

The legislative department is alone responsible to the people for the justness and fidelity of its acts; and as Congress has the undoubted *constitutional right to suppress insurrection and rebellion*, it must, of *necessity*, have the *exclusive* selection and use of all such means as it deems proper to effect that purpose.

In Seple *vs.* The United States, in the circuit court at Richmond, Chief Justice Chase, with reference to this question and the several cases arising under this act and that of August 6, 1861, which had come before the Supreme Court of the United States, says:

"In neither of these cases was this point made, either by counsel or by the court, and it is a fair conclusion that, neither at the bar nor on the bench, was the constitutionality of the act doubted. We, at least, unless clearly satisfied that the act is unconstitutional, and satisfied also that the point passed without observation in the Supreme Court, are bound by the action of the court. We shall hold, therefore, for the present, that the act is warranted by the Constitution." And in the following cases it will be seen that the constitutionality of the act has been either expressly or impliedly affirmed. Prize Cases, 2 Black, 635; 2 Sprague, 123; Blatch., P. C., 119; Mrs. Alexander's Cotton, 2 Wall., 406; Union Ins. Co. *vs.* United States,

6 Wall., 754; Armstrong Foundry, Ib., 766; St. Louis Foundry *vs* United States, Ib., 770; 30 Indiana, 5.

And the Court of Claims, in an elaborate and well-considered opinion, in what are called "The Cotton Cases," (2 Court of Claims Reports, 529,) through Chief Justice Casey, unanimously said: "In regard to the seizure of the enemy's private property on land, Congress, by a series of enactments pending the recent rebellion, have so distinctly specified the property subject to capture and confiscation, that nothing scarcely is left for judicial construction. Their right and constitutional power to do so cannot be even plausibly controverted."

The only seemingly exception to this uniform and resistless current of authority in favor of the validity of the act, is the case of Norris *vs.* Doniphan, 4 Met., (Ky.,) R., 385. But, as the decision in that case is based entirely upon the supposition that the Government did not possess the same belligerent rights in a civil war which it had in a foreign one, it, too, must be taken as fully supporting the constitutionality of the act, since it is conclusively settled by the Supreme Court of the United States, in the Prize Cases, that the Government possesses the same rights in a civil war which it has in a foreign war; and the Kentucky court in the above case (4 Met., 392, 393) explicitly and unqualifiedly admits that if such be the case, then there can be no doubt whatever as to the constitutionality of the act.

The act of confiscating enemy property is but a high act of reprisal and war, and necessarily and exclusively incident to a state of war, and the right so to do resides in the war repelling as well as war-making power.

In Knoefel *vs.* Williams, 30 Indiana R., 5, the court well says:

"*It is objected that this law is unconstitutional.* It is argued

that this act is an act for the punishment of treason, and that it deprives the person implicated of a trial before the punishment. But we apprehend that confiscation acts stand on a much broader basis. Congress has power to 'provide for the common defence and general welfare of the United States;' * * * 'to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;' * * * 'and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' Const. U. S., Art. I, sec. 8. *The act in question is clearly within the powers thus conferred on Congress.* * * * *

"*There is no limit on the war power of the United States,* except such only as is imposed by the law of nations. And in this respect there is no difference between a civil and a foreign war. *Congress has as much power to 'suppress insurrections' as to 'repel invasions.'* Resort may be had to any means known and recognized by the laws of war."

Congress must, then, of *necessity*, have the power to say in what mode and manner property may be taken and condemned as enemies' property. It has the right to select its own mode and means for carrying on war. It is the sole and only judge of the means to be used in war. It determines the character and number of the troops to be employed. It appropriates without restriction all the money and means it deems necessary to insure the success of the war. Peace and war depend upon its own unlimited will. It says let there be war, and there is war. And the President and Senate have but to say let there be peace, and there is peace.

Who, then, shall question the power of Congress (and that, too, under the Constitution) as to the means of war,

and as to the manner in which it shall enforce rights which are incident to a state of war? Its discretion and will in such matters are unquestionably beyond control, and, when made known, must form the rule of decision for the courts, and be regarded as a valid and a *constitutional* exercise of power.

ATTAINDER.

VI. *The Act not a Bill of Attainder.*

It has been said that the act is a bill of attainder, and that as it is provided in the 3d paragraph of section 9, Article I, of the Constitution of the United States, that "no bill of attainder or *ex post facto* law shall be passed," the act is, therefore, unconstitutional and void. This is a great mistake, and deserves to be answered. The act in question possesses no one of the essential requisites of a bill of attainder.

Bills of attainder are acts of the sovereign power pronouncing *capital* sentences, where the Legislature assumes judicial magistracy; and *bills of pains* and penalties, those which of themselves inflict milder punishments. They are legislative acts, passed for the special purpose of attainting of themselves particular named individuals, of treason, or felony, or inflicting pains and penalties beyond or contrary to the Common Law. See 1 Tucker's Black Com., 292.

This is implied by the Supreme Court of the United States in the case of Fletcher *v.* Peck, 6 Cranch, 138, where it is said, "A bill of attainder may affect the life of an individual, or may confiscate his property, or both."

It is the legislative punishment of a *particular* individual or individuals by legislative enactment *solely*, without the intervention of any judicial authority or proceeding whatsoever, either *in personam* or *in rem*, that constitutes an act a bill of attainder. A bill of this nature and character no

one, in this country, would say could be constitutionally passed, either by the State or National Legislature. But that Congress may prescribe that the doing or not doing of a certain act shall be illegal, and provide a forfeiture of property as a penalty for a violation of the law, *must be admitted.* When a party violates the law, the forfeiture rightly accrues to the Government as a punishment annexed by law to the illegal act or omission of duty.

It would be impossible, therefore, to hold the provisions of the statute in question a bill of pains and penalties, much less a bill of attainder.

No personal punishment is contemplated or provided for in those sections of the statute under which proceedings in confiscation were had.

There is no legislative taking of the property of any particular individual or individuals. The forfeiture arises by reason of the conduct of the parties *after* the passage of the law. On this principle, statutes forfeiting ships, goods, and other property have been uniformly sustained and enforced. It is, therefore, evident that there is no ground whatever for saying the act is a bill of attainder, or even a bill of pains and penalties.

SEIZURE.

VII. *Seizures made by any one, with or without instructions from the President, valid if property condemned.*

The statute says the property of the persons named therein shall be liable to seizure and forfeiture, and it is made the *duty* of the President to cause the seizure of the same. It is, therefore, seen that the statute is *mandatory*, and left no *discretion* in the President as to the seizure of the property of persons coming within the act. Seizures, then, made by subordinate officers, in pursuance of instructions from the

Attorney General, (who is presumed to represent the President,) must be taken and regarded as made by the authorization of the President.

And this must more especially be so considered where the proceedings not only show such to be the case, but also show the further fact that the property was seized by the marshal in pursuance of process issued from the court in which the proceedings were instituted. For the court certainly acquired jurisdiction by a seizure under its process, even if it did not possess it before, under and by virtue of the first seizure. Besides, the law is too well settled to admit of doubt or controversy, that any person may seize property for a forfeiture, and if the Government comes in and institutes proceedings to enforce the forfeiture, it will be considered a ratification of and equivalent to a previous command or authority to make the seizure. Blatch. P. C., 64, 65, 89, 90, 306, 309, 561; The Caledonia, 4 Wheat., 100, 103; Taylor *vs.* United States, 3 How., 197, 205–6. The filing of the libel is the ratification of the seizure. Blatch. P. C., 561; ib., 309.

The cases of Coppel *v.* Hall, 7 Wal., 542; The Ouichita Cotton, 4 ib., 521; The Reform, 3 ib., 617; and Gelston *v.* Hoyt, 3 Wheat., 246, *do not* (as has been supposed) *in the least* conflict with the foregoing views and authorities. The cases in Wallace related to trade and intercourse with the States in insurrection; and the defence to avoid a forfeiture was a license and authority from subordinate officers of the Government.

But the court very properly *held* that as trade and intercourse with the enemy was unlawful, unless specially authorized and allowed by the President, who *alone* was empowered by the statute in his discretion to authorize and

permit it, the power could not be exercised by any one else, either with or without the sanction of the President; and the defence was, therefore, unavailing and the property condemned.

And the case in 3 Wheat. was an action for trespass for a seizure which had been adjudged tortious, for a forfeiture under the neutrality act; and the defence was a justification that the seizure was made under and by virtue of instructions and authority from the President of the United States. But the court very properly overruled the defence, on the ground that the President, under the act, could not use any force outside of the army and navy for that purpose, and that he was only authorized to act and was restricted by the statute to the use of the army and navy, where the civil authority was resisted, or was, in his judgment, insufficient to enforce and execute the laws.

Such a case *surely* cannot be regarded as at all inconsistent or in conflict with the foregoing authorities, which establish beyond all doubt the validity of seizures of property for confiscation, under act 17th of July, 1862, whether made solely by the order of the President, or by the marshal in the first instance, by the direction of the district attorney, in pursuance of instructions from the Attorney General, and also by virtue of process issued out of the courts after the first seizure and the filing of the libels.

Indeed, the case of Gelston *v.* Hoyt, 3 Wheat., 246, itself *expressly* affirms and declares the rule to be, that at Common Law any person may, at his peril, seize for a forfeiture, and that if the Government comes in and adopts his seizure and the property is condemned, it will be a complete justification of the seizure.

VIII. *The Act is not unconstitutional by reason of its authorizing and requiring proceedings, for the purpose of condemnation, to be in rem.*

The first question that naturally arises in this branch of the case is, what is the nature and character of a proceeding *in rem?* Is it a *criminal* or a *civil* proceeding? The answers to these inquiries must have a decisive influence in determining the validity of the confiscation proceedings under the act.

A proceeding *in rem* is one which has for its object the fixing of the *status* of a particular thing; that is, of determining whether it is or is not forfeited. In Gelston *v.* Hoyt, 13 J. R., 584, Chancellor Kent, in speaking on this subject, says: "In a case in the Exchequer, where the goods are themselves seized and libeled as being forfeited to the Government, and which is termed a proceeding *in rem,* the question of forfeiture is the only question that can be made." Mr. Justice Story, in the same case, before the Supreme Court of the United States, (3 Wheat., 312-13,) in reference to the nature of proceedings *in rem,* said: "All persons having an interest in the subject-matter, whether as seizing officers, or informers, or claimants, are parties or may be parties to such suits so far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture." And again, at page 318 of the above case, this same eminent jurist says: "Where property is seized and libeled as forfeited to the Government, the sole object of the suit is to ascertain whether the seizure be rightful and the forfeiture incurred or not. The decree of the court, in such case, acts upon the thing itself, and

binds the interests of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. If, on the other hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be re-annexed to it."

And in the case of the State *v.* Barrels of Liquor, 47 N. Hamp., 369, it is held that a complaint for the condemnation of property is a proceeding *in rem*, for the purpose of determining merely whether the property proceeded against is forfeited or not, and is not a proceeding against any person.

It is, therefore, seen, from the nature and character of a proceeding *in rem*, that it is a proceeding against a particular thing, in order to fix its *status;* that is, to determine whether it is or is not *forfeited;* and this without any reference to any party or parties in interest, whether within or without the country. It would seem, then, to be clear that there is no ground for objection to the statute, because it does not require any personal proceedings against the party or owner of the property proceeded against for a forfeiture.

For, it is well settled by an unbroken current of authority that proceedings *in rem* for a forfeiture or an action for a penalty are not criminal but *civil* proceedings. Markle *vs.* Acron, 14 Ohio, 491; State *vs.* Barrels of Liquor, 47 N. Hamp., 369. Anonymous case, 1 Gall. R., 23; Ketland *vs.* The Cassius, 2 Dall., 365; United States *vs.* The Sally, 2 Cranch R., 406; United States *vs.* The Betsey and Charlotte, 4 Cranch, 443; 3 Sum. R., 120, 121; 3 Bl. Com., 159; 12 Wheat., 12, 13; Barancoat et al. *vs.* Gunpowder, 1 Met. R., 230; Earl Spencer *vs.* Swannell, 3 M. & Welb. R., 162; Attorney General *vs.* Rogers, 11 M. & W., 670; 37 Me. R., 330, 333.

In the case of the United States *vs.* La Vengeance, 3 Dall., 297, which was an information to forfeit a vessel for violation of a law prohibiting the exportation of arms and ammunition, Chief Justice Marshall said: "We are unanimously of opinion that it is a civil cause; it is a process in the nature of a libel *in rem;* it does not, in any degree, touch the person of the offender." S. P., 47 N. Hamp., 369.

In Barancoat et al. *vs.* Gunpowder, 1 Met., 230, Chief Justice Shaw says: "The court are of opinion that a libel, sued as a process *in rem* for a forfeiture, is in the nature of a civil action, and that either party may file exceptions in matter of law."

So in the case in 1 Gall., 23, Mr. Justice Story said: "It is not true that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are *civil* proceedings."

Martin, J., in an elaborate and well-considered opinion, in The State *vs.* Williams, 7 Rob., La. R., 266–7, reviewed all the leading authorities, and held that a penal action, or an action to recover a penalty, was a *civil* and *not* a criminal proceeding.

Judge Martin, in the above case, well says: "The statutes of Jeofails and amendments do not extend to criminal proceedings; but it has been invariably held that penal actions are within these statutes, and may be amended. 1 Bac. Abr. Title Amendment and Jeofails, A. and C.; 2 Str., 1227; 2 Dallas, 143; 1 Gallison, 23.

"In cases of acquittal on criminal prosecutions no new trial can be granted; but new trials may be granted in penal actions. 4 Bl. Com., 361, 362; 1 Durnford & East, 753.

"Judge Story says: 'At Common Law, whenever a penalty is given, and no method of recovery is prescribed by the act, an action of information of debt lies, and not an indictment.'

He cites, in support of this position, 2 Strange, 828, and 2 Cranch, 336. See 2 Gallison, 554. In the case of *The United States* vs. *Lyman*, the same doctrine is again put forth with great clearness. 1 Mason, 498.

"In 1838, the doctrine is once more explicitly declared by Judge Story, after a full examination. He says: 'The usual remedy in cases of a pecuniary penalty is an action or information of debt; and an indictment for such a penalty will not lie, unless specially allowed by statute, for it is properly recoverable as a debt in a court of revenue by the Government, and is, in no just sense, a criminal proceeding.' 3 Sumner, 120, 121."

Even an exchequer information for penalties is a *civil* proceeding; it is the "king's action of debt." Cawthorne *vs.* Campbell, 1 Anst., 205, N., 214; Attorney General *vs.* Freer, 11 Price, 183, per Graham, B., 185.

And in the case of The United States *vs.* Mann, 1 Gall. R., 178–9, Mr. Justice Story says: "For I take it to be clear, that an information of debt in the exchequer for a penalty is as much a civil proceeding as an action of debt. Nor would it be any objection to this construction, even admitting it to be true, that in this manner the jurisdiction of the court would depend, not upon the subject-matter, but on the mode of prosecution. For, without question, all infractions of public laws are offences; and it is the mode of prosecution, and not the nature of the prohibitions, which ordinarily distinguish penal statutes from *criminal statutes.*"

In the case of the Palmyra, (12 Wheat., 12–13,) the Supreme Court of the United States uses this emphatic language: "The strict rules of the Common Law as to criminal prosecutions have never been supposed by this court to be required in informations of seizure in the admiralty for forfeitures, which are deemed to be civil proceedings *in rem.*"

Proceedings *in rem*, then, for a forfeiture, although the forfeiture is intended as a punishment by the law-maker for the violation of law, are not to be regarded as criminal, but as *civil* proceedings.

And in civil proceedings or prosecutions for penalties and forfeitures there is no occasion for the intervention of a grand jury and an indictment, but the process is that of information or libel filed by the law-officers of the Government. 2 St. Const., § 1786.

In Markle *v.* Akron, 14 Ohio R., 590, 591, Wood, C. J., says: "It is true, for offences, strictly criminal or infamous, punishment can only be inflicted through the medium of an indictment or presentment of the grand jury. Con., Art. VIII, sec. 10. There are, however, many offences, made so by statute, which are but *quasi* criminal, and where the Legislature may direct the mode of redress, untramelled by this constitutional provision."

And in the case of the State *v.* Barrels of Liquor, 47 New Hamp., 374, Mr. Justice Sargent, in reference to the question whether a proceeding *in rem* was to be tried as a criminal or a civil case, &c., said: "This is a proceeding *in rem*, for the condemnation of the liquor and vessels. No penalty or fine is to be imposed upon the person who keeps the liquor with intent to sell under this proceeding. All that is done, or that can be done, under this complaint, is to settle the question whether the liquor, vessels, &c., shall be condemned as forfeited to the country, or shall be delivered to the claimants or restored to the place from whence they were taken. It is a proceeding which cannot be commenced by indictment, and the complaint which is made in the first instance is in the nature of a libel, such as ch. 204 Rev. Stats. provides for, and not in the nature of a criminal complaint against any person, but is simply a proceeding *in*

rem against the liquors, &c., for their condemnation as forfeited property, &c.

"This class of cases are to be considered and tried as civil causes are tried. The question involved is only as to the title to property, like other questions in civil causes. It is only when some crime or misdemeanor is charged upon an individual that all reasonable doubt of the guilt of the accused must be removed. But here no one is accused of any crime; in fact, it is not a proceeding against any person."

So, under the act of 1862, the proceedings are strictly civil and *in rem*, 12 U. S. Stat., 591, § 7. And in such cases, as well as those where there is both a forfeiture and a personal penalty, no conviction of the party is necessary to enable the Government to enforce the forfeiture *in rem*. The Palmyra, 12 Wheat., 1, 14, 15; United States *v.* Dry Goods, 17 How., 85, 91, 92, 93. The property is divested by the forfeiture, (by the failure to return to their allegiance in the prescribed time,) and all sales even to a *bona fide* purchaser without notice would be void. 12 U. S. Statutes, 591, sec. 6; United States *v.* Bags Coffee, 8 Cranch, 398; Caldwell *v.* The United States, 8 How., 366, 381, 382; United States *v.* Morris, 10 Wheat., 246; Fontaine *v.* Phœnix Ins. Co., 11 J. R., 300; 3 Wheat., 311, 327.

For "where a forfeiture is given by a statute, the rules of the Common Law" (which require legal steps to be taken before the property vests) "may be dispensed with, and the thing forfeited may either vest immediately or on the performance of some particular act, as shall be the will of the Legislature." United States *v.* Grundy, 3 Cranch R., 350. Per Marshall, Ch. J. In the nature of things, then, proceedings *in rem* for the enforcement of forfeitures and penalties cannot be regarded in any other light than as *civil* proceedings, and are in no way dependent on the prosecution

and conviction of the offending party. The Palmyra, 12 Wheat., 14, 15.

For the seizure and condemnation of property by a proceeding *in rem* for a forfeiture may (and often does) take place when there is no personal penalty prescribed, and where, if there was, it would not be possible to proceed against the party personally for a violation of law by reason of his absence. And laws authorizing proceedings *in rem* may be enforced against the property seized when the real owner may not, in point of fact, be informed thereof. Gray *v.* Kimball, 42 Me., 299.

In all "criminal proceedings against a party for a capital or otherwise infamous crime," the provisions of the Amendments to the Constitution of the United States *undoubtedly* require the trial and conviction of the party by jury, after a presentment or indictment by a grand jury. But in all *civil* proceedings, even in times of peace, "*due process* of law" is all that is required in order to deprive one of his property, or enforce a penalty.

What, then, is "due process of law?"

Chancellor Kent, after adverting to what is due process of law in criminal cases, says: "But the better and larger definition of *due process of law* is, that it means law in its regular course of administration through courts of justice." 1 Kent's Com., 624, 625, 10th edition.

In Fisher *v.* McGirr *et al.*, 1 Gray's R., 27, 28, Chief Justice Shaw says: "We have no doubt that it is competent for the Legislature to declare the possession of certain articles of property, either absolutely or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious; and, by due process of law, *by proceedings in rem*, to provide both for the abatement of the nuisance and the punishment

of the offender, by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles. Therefore, as well to abate the nuisance as to punish the offending or careless owner, the property may be justly declared forfeited, and either sold for the public benefit or destroyed, as the circumstances of the case may require, and the wisdom of the Legislature may direct. Besides, the actual seizure of the property intended to be offensively used may be effected, when it would not be practicable to detect and punish the offender personally."

In this decision we have a clear recognition of the doctrine that a proceeding *in rem*, by which a party may be deprived of his property, is "*due process of law*," and that it is competent for the Legislature to provide this mode of proceeding against property because of a violation of the requirements of a statute by the owner or those who have the control of the same.

It is true, the court held the act of the Legislature involved in that case illegal and void, but the decision was rested mainly on the ground that "no provision is made by the statute for a trial, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed." "The judgment, then, passes without trial and without proof, unless that which preceded the seizure, and the seizure itself, are to be considered as legal proof." Ib., 36.

This case, therefore, so far from being an authority against, must be considered as fully warranting and justifying proceedings *in rem* under the act of 1862, as being "*due process of law.*"

Indeed, it is perfectly apparent, from the above case, that if the statute had provided for and required regular and

legal proceedings *in rem*, it would have been held legal and constitutional. See 1 Gray, 48-9.

Do not parties forfeit their ships, goods, &c., by a violation of the provisions of the revenue laws, and are not these forfeitures enforced by proceedings *in rem?* And if this may be done in reference to personal property, why may not the same mode of proceeding be adopted in reference to any and every description of property? If the one may be taken and confiscated under a proceeding *in rem*, why may not the other be taken in like manner? Would there not be due process of law as much in the one case as in the other? Most assuredly there would.

It has, moreover, been *held* by the highest authority that *due process of law* means such process as has been usual, and is authorized by the law-making power. 18 How. R., 272; 7 Ann. (La.) R., 292. In the first of these cases process issued direct from the Treasury for a balance due the Treasury, and in the latter for the collection of taxes, without any resort whatever to any court, and yet in both cases the process was *held* to be *due process of law*.

How can it be doubted, then, that the proceedings *in rem* under the act in question are legal and constitutional? Here is a well-known and long-established mode of proceeding in a court of justice. Here all the world are parties, and have notice by seizure, as well as by publication of monition, and may come in and be heard if they see fit. The opportunity is then afforded to every one claiming an interest in any property proceeded against to come in and establish his right to the same, and if he fails or neglects so to do, the property is then condemned according to law in its regular course of administration through courts of justice, and the judgment of condemnation or acquittal is binding

upon all the world. 13 J. R., 561; 42 Me. R., 443, 430; Gelston *vs.* Hoyt, 3 Wheat., 247, 312.

The attempted distinction that it is only in those cases where the thing is considered as the offender that a proceeding *in rem* can be sustained, is quite a mistake.

"Most of the forfeitures" (says Conkling in his Treatise, 548, 4th ed.) denounced by our laws, are imposed for omitting to do some act enjoined by law."

In the case of the United States *v.* Grundy *et al.*, 3 Cranch R., 337, it was decided that, under the act of Congress of December 1792, which declares that if a false oath be taken in order to procure a register for a vessel, *the vessel, or its value*, shall be forfeited, the United States had an election to proceed against the vessel as forfeited, or against the person who took the false oath, for its value. In Fontaine *v.* The Phœnix Ins. Co., 11 J. R., 293, 300, the Supreme Court of New York, after referring to the case in 3 Cranch, and after recognizing the correctness of the same, says: "The act of 1792 gives two remedies, the forfeiture of the vessel, or the value, to be recovered from the person who took the false oath; consequently, the remedy is at the election of the United States. The property, therefore, could not vest until the seizure. The act in relation to the case before us" (the non-intercourse act of 1809) "affords but one remedy, and that is the forfeiture of the vessel, so that the seizure is not necessary to change the property; the owner loses his right to it immediately after the commission of the act producing the forfeiture."

Here we have a clear statement of the principle on which the law of forfeiture is based. And that principle is, that the party loses his right to the thing by reason of his own act, and not the act of the thing, which has no power or

capacity to act of itself, and which is indispensable to make it an offending party.

Again, in the case of the Fire Department *v.* Kip, 10 Wend., 270, the court, after referring to the statute prohibiting the keeping of gunpowder within certain limits, says: "The property would become forfeit by the act of keeping it contrary to law." Here it is again said that the property would be forfeited in consequence of the act of the owner. There was no thought or idea in the mind of the court of an offending thing. So, under the act of July, 1838, a party running a boat without license is liable to a penalty of $500, and for which sum the boat or vessel so engaged shall be liable. This latter provision, it has been held, "is simply used to give a remedy by libel against the boat." 1 Newberry's R., 269. The boat, then, in such case, could not be considered the offending thing; but it is the disregard of the injuction of the law by the owner that renders the vessel liable to seizure and forfeiture. It is not the use of the boat that causes the forfeiture, but it is the disregard of the requirement to procure a license that gives rise to the penalty. So under the ship registry act of 31st December 1792, where a registered vessel, or a part thereof, is sold or transferred by way of trust to a subject or citizen of any foreign prince or state, for the purpose of evading the revenue laws thereof, and such transfer is not made known as required in the act, the vessel becomes forfeited. 9 Wheat., 421. And if the register of a vessel thus transferred is used after such transfer, the vessel is also liable to forfeiture for this cause. The Margaret, 9 Wheat., 421. So, under the sixty-seventh section of the act of 1796, a libel *in rem* for a forfeiture of goods by reason of their differing in description from the contents of the entry, is a proper remedy. 200 Chests Tea, 9 Wheat., 430. In the case of the United

States *v.* The Anthony Magin, 2 Pet. Adm. R., 469-70, Judge Winchester well says: "The Government prohibits an act under a penalty against the party offending. They say, we for this forfeit the thing in respect to which you have sworn falsely, if it continued in existence, *and is yours*, but if lost or destroyed, or other persons innocently acquire new rights in that thing, your guilt shall still be punished; if annihilated—if sold—pay the value; if you have fraudulently impaired the thing, still *pay the value;* the one or the other shall be recovered of *you*—of *you*, the guilty party."

Is there any offending thing in cases of the foregoing character? Certainly not.

In the case of The Palmyra, 12 Wheat., 14–15, Mr. Justice Story, says: "It is well known that at the Common Law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in cases where the Crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the Common Law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute *in rem*, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibi-*

tum or *malum in se*. The same principle applies to proceedings *in rem*, or seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceedings *in rem* stand independent of and wholly unaffected by any criminal proceeding *in personam*." "No personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature." S. P., 2 Black., 672-3; 6 Am., L. Reg, (N. S.,) 32, 40-1; 47 N. Hamp., 369.

From this decision, as well as the foregoing authorities, it is clear that the forfeiture of property is based on the act of the owner, and not on the ground that it is an offending thing. True, the court speaks of an offending thing, but it immediately changes the language and puts the forfeiture on the true ground, as will be seen by the following passage: "The thing is here primarily considered as the offender, *or rather, the offence is attached primarily to the thing;* and this, whether the offence be *malum prohibitum* or *malum in se*." The thing, then, is certainly not to be considered as the offender, but the penalty for the offence of the party is primarily attached by law to the thing, and thus becomes forfeited by reason of the act of the owner or those whom he has entrusted with the control and management of the thing, and are, therefore, for the time being, to be considered as the owners.

It is on this ground that the vessels of innocent owners are forfeited by reason of the acts of those who have them in possession. It is not because the vessel is considered as

the offending thing that it is forfeited, but because of the acts of those whom the careless or deceived owner has entrusted with the use and management of the property, and the "offence is attached primarily to the thing," that is, the *forfeiture* attaches primarily to the thing for the acts of those who are the apparent owners. This is the true ground on which the doctrine of forfeiture is based. It was on this principle that some of the confiscation acts of the Revolution were founded.

By reference to the case of Martin *v.* The Commonwealth *et al.*, 1 Mass. R., 385–6, it will be seen that the forfeiture was claimed and enforced by a proceeding *in rem*, because of the absence of the owner of the property and his failure to return to the State as required by law. Now, this is a parallel case in principle to the one before the court. The proceedings in that case, as in this, were because of the act of the owner in not returning to his allegiance, as required by law; and the forfeiture was not claimed on the ground that the property was an offending thing, but it was claimed, and rightly claimed, because "the offence" (that is, the penalty of forfeiture) "is attached primarily to the thing," because of the failure of the owner of the thing to obey the mandate of the law.

So in Pennsylvania, a party's property was forfeited because he failed to return to the State as required by law, and stand his trial for high treason. Ash *v.* Ashton, 3 Watts & Serg. R., 510. The property was forfeited because of non-compliance of the owner with the requirements of the law, and not because it was or could become an offending thing. And so property acquired by an alien is forfeited to the king; but it is not forfeited because it is an offending thing. It is forfeited, as Mr. Justice Blackstone says, "by way of punishment for the alien's presumption

in attempting to acquire any landed property." 1 Bl. Com., 372.

And "every State may absolutely forbid its subjects to do any given thing, wherever they may be, provided they do not enforce that prohibition by any act of jurisdiction exercised out of its own territories, and within those of another State. And the subject so offending may be compelled to return home, or punished on his contumaciously remaining abroad, by process against his property situated in his own country." Bowyer's Univ. Pub. L., 181. See 18 How., 114.

This being the law, there is really no foundation whatever for the doctrine of an offending thing.

To say that an inanimate thing, incapable of volition or action, is an offender against the law, is a mere rhetorical flourish—an attempt, by the use of figurative language, not only to personify the thing, but to turn the mind from the consideration of the individual offender and the nature of the offence against which the law was made, and to jumble together fact and fancy, law, logic, and imagination. It is bad in every point of view—a poor specimen of legal metaphor, of strained fancy and foggy metaphysics. Indeed, it is but a legal fiction, which, like the "Will-o'-the-wisp," or Jack with his lantern, the more it is admired and the further it is pursued, the greater the dangers and delusions to which it subjects, to say nothing of the inextricable and perplexing quagmires into which it leads its charmed pursuers.

How idle and visionary, then, to talk about an offending thing! Property commits no crimes. But it is just and proper, when crimes are committed or the majesty and mandates of the law are not respected and obeyed by those who possess property situate in the country whose laws they set

at defiance, that the offenders should be punished through the forfeiture of property, and a forfeiture enforced by a proceeding *in rem,* whether they are or are not beyond the reach of the process of law. If they are personally beyond the reach of the process of the court, are their crimes against their country to go unpunished? Certainly not. And if they be within the country, (and no enemy is more dangerous,) it is competent for Congress to prescribe whether the punishment shall be personal, or whether the violated majesty of the law shall be atoned for by forfeiture of the property of the offending party. There is nothing, then, in the doctrine of offending thing.

The proceedings *required* and contemplated by the statute are precisely in nature and extent what a proceeding *in rem* is against a vessel or goods for a violation of law by the owner or possessor thereof. See 12 U. S. Stat., 591, § 7.

True, all the world are parties, or may be so if they choose to come in and propound their interest in the proper form, but this does not vary the nature or character of the suit.

Even if a claimant appears and puts in his claim, still it is but a suit *in rem.* Gilpin's R., 314, 315. In this case, Judge Hopkinson says: "Certain persons come in and deny the forfeiture, and claim the goods as their property. But they are not substituted as defendants in the cause. It stands, in this respect, as it did before the claim was put in. The goods are brought under the authority and control of the court, and two parties appear to claim them, and the judgment of the court is to decide to which of the claimants they rightfully belong. The action or proceedings of both is upon and against the goods in the custody of the court, and there is, legally speaking, no party defendant in the case." S. P. 24, How., 436; 18 How., 503; 2 How., 338; 2 Wallace, 216.

"Libellant and claimant are both actors." 4 Cranch, 23. "The proceeeings of that court are *in rem*, and their sentences act on the thing itself." Ib.

From the nature and character of a proceeding *in rem*, then, under the statute, it cannot, in any legal sense, be said to be a suit *in personam*, and that a conviction of the party is necessary to enforce the forfeiture, under the act. Indeed, such a thing would be impossible in a proceeding for a forfeiture. 47 New Hamp., 374–5; 6 Am. L. Reg., (N. S.,) 40.

For it is expressly provided in the *seventh* section of the act of 1862 (12 U. S. Stat., 691) as follows: "That to secure the condemnation and sale of such property, after the same shall have been seized, so that it may be made available for the purposes aforesaid," (that is, for the support of the army, as provided in the fifth section,) "proceedings *in rem* shall be instituted in the name of the United States, in any district court thereof," and "which proceedings shall conform as nearly as may be to the proceedings in admiralty or revenue cases."

It is, therefore, a proceeding which could not be commenced by indictment. State *v.* Barrels of Liquor, 47 N. Hamp., 369, 374.

And that a proceeding *in rem*, although a civil proceeding, as we have seen, is a proper and constitutional mode of enforcing the provisions of a highly penal statute *solely against property*, there can be no doubt. United States *v.* Eighty-four Boxes Sugar, 7 Pet., 450; 19 How., 92, and foregoing authorities, and *especially* The Palmyra, 12 Wheat., 1, and Prize Cases, 2 Black, 672, 673; 6 Am. Law Reg., (N. S.,) 32, 40–1; 47 New Hamp., 369.

For where the seizure is within the admiralty jurisdiction

the trial is by the court, as juries do not intervene in proceedings in admiralty. 5 How., 460; 3 Dall., 297.

And where the seizure is made on land the proceedings are on the Common Law side of the court, and *issues of fact* are triable by jury. Armstrong Foundry, 6 Wall., 766.

But in case of a default the rule is, as was said by Chief Justice Chase, in Semple *v.* the United States, in the circuit court at Richmond, "The cause was suffered to go by default, and there can be no direction of trial by jury where no issue is made up and no such trial demanded. On the contrary, it is the constant practice to render judgment of forfeiture in such cases by default, without the intervention of a jury." Conkling's Pract., 568. See 50 Barb., 385, 394. And the same rule was laid down by Judge Ware, in the Mary Ann. Ware's R., 106. S. P. 35 N. Hamp., 132.

And Chief Justice Marshall, in The Mary, 9 Cranch, 126, 142, well says: "By the rules of the court the condemnation of the vessel was inevitable; not because, in fact, she was British property, but because the fact was charged, and was not repelled by the owner, he having failed to appear and put in his claim." See 35 N. Hamp., 132.

From this consideration of the authorities it is manifest that the form and mode of all the proceedings are perfectly legal and valid.

For where no party appears, and all are in default and contumacy, there is no fact to be tried; the libel is taken for confessed, and judgment rendered as though the party had appeared and confessed all the facts charged in the same.

A default is an admission of the facts stated in the complaint or indictment. 12 Minn., 221; The State *v.* Richmond, 6 Fost., 247.

So, where a bill is taken *pro confesso*, the party is as much bound as if he had appeared in open court and filed an answer admitting the truth of the allegations of the bill throughout. 4 Gilman R., 511, 517; 11 Alab., 668; Sinclair *v.* Williams, 8 Iredell's Eq. R., 335, 336; Attorney General *v.* Carver, 12 Iredell, 231.

No jury is necessary on a default. 25 Ill., 178.

For that which is confessed or admitted needs no trial to prove, as the fact is as certainly established by confession or admission as though the same were found to be true by the verdict of a jury.

There can be no trial by jury, then, where the case is suffered to go by default.

And that such is the law is further evinced from the fact that if a right of trial by jury is not demanded by the party who is entitled to the same, it is considered as waived. 4 Wheat., 243, 244; 12 How., 460; 8 Indiana, 217, 218; 1 Pet., 566.

But when it is recollected that the confiscation proceeds on the ground that it is "*enemies'* property," there can be no earthly doubt as to the validity and sufficiency of the proceedings.

The title to property captured on land has always been considered as complete by the fact of capture and a firm possession. In England the court of admiralty had no jurisdiction with respect to booty—property captured on land by land forces exclusively—until the passage of the 3 and 4 Vict., c. 65, which enacts that the court "shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof." * * * "The court shall proceed as in cases of prize of war, and the judgment of the court shall be binding upon all parties concerned." Banda andKirwee Booty, 1 Law (Adm.) R., 109.

And not only is it customary and usual for the military to take and use personally without any condemnation whatever in a court of justice, but they also take and use houses and lands, and levy contributions at will upon all the inhabitants of the enemy country for the support of the army.

Congress might, therefore, under the war power of suppressing insurrection, have made provision, without the intervention of any court, for the army taking and confiscating the whole enemy country for the support of the army, as well as to indemnify the expenses of the war.

But the Government, not wishing that the loyal should suffer with the disloyal, made provision in the act for confiscating only the property of those whom it put upon the footing of enemies. Hence the necessity of judicial proceedings to ascertain the fact of the property seized belonging to a person named in the act.

And but for this benign and humane modification of the belligerent right of confiscation, there would have been no occasion whatever for courts to condem the property seized, except for the purpose, perhaps, of making it more available for the support of the army and the reimbursement of the expenses of the war.

Congress, therefore, being under no obligation whatever to provide a remedy in its courts respecting the confiscation of property of the enemy, was at perfect liberty to prescribe its own terms when it saw fit to give one. 18 How., 284; 12 ib., 460; 5 ib., 460.

In 7 Cranch it is said: "In the case of Smith *vs.* The State of Maryland, (6 Cranch, 286,) this court sustained a specific confiscation of lands under a law of the State where there was neither conviction nor inquest of office."

Chancellor Kent, (1 Com., 112, 10th ed.,) in speaking of the necessity of the condemnation, even of prize, says: "As

between the belligerent parties, the title passes and is vested when the capture is complete." "The question" (that of title) "never arises but between the original owner and a neutral purchasing from the captor, and between the original owner and a re-captor."

And this same eminent authority, at page 113, has also said: "A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favor of a neutral vendee, or re-captor, so as to bar the original owner, until sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor; and the purchaser must be able to show documentary evidence of the fact to support his title."

From this exposition of the law it is clear that there is a great distinction between what is called *military* and *civil* rights. Military rights are evinced alone by possession; and so long as military possession exists, so long does that possession furnish conclusive evidence, to all the world, of title. But when the title is changed by sale or other disposition, then the title of the purchaser becomes a civil title, as contradistinguished from the military title, because the latter arises out of a state of war and possession merely, whereas, in the former, the title arises out of contract, donation or grant, and is therefore purely civil. Possession alone, then, is conclusive evidence of the military right, and neutrals are bound to take the fact of possession for the law. But as to civil rights, a decree of condemnation can alone furnish record evidence to neutrals of the right of property. By the decree of condemnation, the military right is converted into a civil right.

So far, then, as respects the right of the captor, there is no necessity whatever for any judicial proceedings. His right and title, so long as he retains possession, is as complete without as with a judicial condemnation. Indeed, the latter is wholly incompatible with the military right. For the latter ceases on a decree of condemnation and becomes merged into a civil right. And all condemnations of vessels and other personalty take place in the country of the captor by proceedings *in rem*, and the mode and manner pointed out by the laws of the country of the captor. It is, therefore, seen that, strictly speaking, there is no necessity whatever for any condemnation of captured property so long as the property remains in the country or possession of the captor. The title of the captor is as complete without as with a decree of condemnation, for neutrals are bound to see right wherever they see the possession of the captor. Even lands which have been sold, or those in the possession of the conqueror at the conclusion of peace, and in respect to which the treaty of peace is silent, remain and belong to the conqueror without any condemnation whatever in a court of justice.

Mr. Wheaton, in reference to this position, has said: "The proprietory right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner, on the restoration of the original sovereign." "But since the *jus postliminii* does not, strictly speaking, operate after the peace, if the treaty of peace contains no express stipulation respecting captured property, it remains in the condition in which the treaty finds it, and is thus tacitly ceded to the actual possessor." "The *jus postliminii* is a right which belongs exclusively to a state of war; and, therefore, a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recapture before the peace." "The

intervention of peace covers all defects of title, and vests a lawful possession in the neutral, in the same manner as it quiets the title of the hostile captor himself." Wheat. Int. L., (Law. ed.,) 884. See 6 Rob. Adm. R. 43; ib., 138.

It is only when the property of a neutral is captured that there is any real necessity for a condemnation; and this necessity arises from the fact that "the property in a neutral captured as an enemy is never changed until sentence of condemnation is passed." 4 Cranch R., 295.

Such, then, being the distinction between *military* and *civil* rights, it is clear that there was no occasion whatever, so far as the military right is concerned, for sny legislation on the part of Congress respecting the property of rebels and traitors.

But in order to make the same more available, it was necessary to have proceedings instituted against the same through courts of justice, as is provided in the act of 1862, so that every claim against the same must cease, (Bynkershoek, 39 Dup. Tr.,) and the decree for all time furnish record evidence of the title of the purchaser, as it had been held by the Supreme Court in the case of the United States *v.* Brown, 8 Cranch, that the courts could not condemn the property of an enemy, as such, without an act confiscating the same.

But the right to confiscate is in no way or manner affected by the necessity of legislation in order to perfect a right derived from war. In other words, the municipal regulations as to modes of procedure are not inconsistent with the war right, as has been supposed. The right to confiscate is a war right recognized by the law of nations, but the mode of enforcing and establishing the same through courts of justice is necessarily of municipal regulation.

In Hudson et al. *v.* Guestier, 4 Cranch R., 297, Chief Justice Marshall has well said: "Possession of the *res* by the

Nor can the discretionary powers of the President and Congress be questioned. 7 How., 1; 4 Wheat., 316.

For it is competent for the legislative department (in which the whole war power resides) to provide for the modes of proceding in and out of the courts of the nation, to enforce and render available its war rights as against the enemy.

By a condemnation of property in the mode required, all claims to the same must cease, and a full and complete title vest in the purchaser. Even as regards neutrals, as we have seen, property thus condemned in the courts of a belligerent is divested of every claim, and if the decision be unjust, the claimant must look alone to his sovereign for redress.

Upon what principle, then, can an enemy object to the mode of proceedings required by the act in the national courts? As an enemy, he has no right to be heard in court. Courts are coustituted alone for citizens and friends; into their sacred precincts an enemy may not enter to claim rights as against the Government he is seeking to destroy, except upon such terms as the Government itself may choose to prescribe .For, as has been well and forcibly said by Mr. Justice Johnson, (12 Wheat., 528,) "*War is a suit prosecuted by the sword.*"

All the objections, then, which have been raised, both in and out of court, as to the validity of the act, are as visionary as delusive, and as unsubstantial as the vision of Æneas, when bemoaning his lost Creüsa amid the crumbling ruins and burning streets of fallen Troy.

"Ter conatus ibi colo dare brachia circum;
Ter frustra comprensa manus effugit imago,
Par levibus ventis volucrique simillima somno."

"And thrice about her neck my arms I flung,
And thrice deceived on vain embraces hung,
Light as an empty dream at break of day,
Or as a blast of wind she rushed away."

IX. *Confiscation of enemies' property is not limited to a mere life by the joint resolution.*

It is true the Supreme Court of the United States, in the case of Bigelow *v.* Forrest, 9 Wal., 339, has held that only a life estate was confiscable under the act of 1862. But that was a case of first impression in that court, and seems to have been founded on a misapprehension of the true mode of applying the law to the facts of the case.

The joint resolution only applies to punishments and proceedings against offenders, and does not extend to enemies and limit the confiscation of enemies' property to a mere life estate.

The Confiscation Act, as it is called, is an exercise of both sovereign authority and the belligerent right of confiscating enemy property on land during a state of war.

The first two sections of the statute relate to the punishment of treason and rebellion. This is an exercise of sovereign authority, and constitutes alone the criminal portion of the act. The other provisions of the act providing for the seizure and condemnation of the property seized, "as enemies' property," is but an exercise of the belligerent right of confiscating enemy property in time of war.

These different provisions of the act are, therefore, to be taken and regarded as separate and distinct from each other. The one relates to citizens and proceedings in time of peace. The other relates to enemies and proceedings in time of war. They are, therefore different from each other in every essential particular. And they also differ from each other as to the mode of procedure and the rules of law which apply to and govern the same. A resolution or provision of law, therefore, which only embraces the one cannot be said to

extend to and include the other. And this being so, it seems to us that the joint resolution (12 U. S. Stat., 627) which says, "nor shall any punishment or proceedings under the act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life," only applies to punishments and proceedings against offenders under the criminal portion of the act, and does not extend to or limit the confiscation of property under the other provisions of the statute, as enemies' property, to a mere life estate.

And this is most manifest from the history of the resolution, as well as from the well-known meaning of the terms used in the same.

The history and object of the resolution, in short, is this: The President (Mr. Lincoln) thought that Congress, according to his view of the Constitution, could only forfeit the real estate of a party for treason for and during the term of his life.

And he was further of opinion that if a fine was imposed, as part of the punishment for treason, as prescribed in the first section of the act, the real estate of the party might be seized and sold in fee to pay and satisfy the fine, and that that, therefore, would, in substance, be doing indirectly what could not be done directly.

In other words, he thought that as Congress could not, in his view, forfeit the real estate of a party in fee for treason, it could not reach the same result by means of a fine and a sale of the real estate in fee to pay and satisfy a fine imposed as a part of the punishment for treason.

And to obviate this objection of the President to the bill was the sole and only object of the amendment to the joint resolution, as its words clearly import and its history fully shows.

The joint resolution explanatory of "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," as it originally passed the House of Representatives, reads as follows: "That the provisions of the third clause of the fifth section of said act shall be so construed as not to apply to any acts done prior to its passage, nor to include any member of a State Legislature or judge of any State court who has not, in accepting or entering upon his office, taken an oath to support the Constitution of the so-called Confederate States of America." Cong. Globe, Part IV, 2d Sess. 37th Congress, pages 3373-4. Upon this resolution being called up in the Senate, Mr. Clarke moved to amend the same by adding: "Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." Ib. 3374.

The object of this amendment will be best understood by giving the exact words of the mover, Mr. Clarke, on the floor of the Senate, and which are as follows: "I present the amendment to meet what I believe to be the objection of the President. That is it exactly." Ib. 3380.

To this Mr. Trumbull at once replied, "what he believes to be the wishes of the Executive; and he never would have thought of presenting the amendment for any other reason Then we are voting to meet the views of the Executive, and for no other reason whatever." Ib.

Here, then, we have the key to the motive of the amendment; and that in the language of the mover was "to meet what I believe to be the objection of the President." Now what was "*the objection of the President*" to the bill which it was proposed to meet by the passage of this amendment to the joint resolution?

The *sole* objection of the President to the bill as stated by Senators Harris, King, Trumbull, and Howard, (*and to whose statements no one dissented,*) was, that Congress, according to his view, could not constitutionally confiscate real estate for treason, beyond the life of the traitor. Here, then, we have the constitutional provision about attainder of treason as the sole and only ground of objection to the bill.

Senator Harris, after stating that this question had been one of the subjects of discussion, and upon which there had been a difference of opinion, and that he had shown on a former occasion, at least to his own satisfaction, that the property of rebels might be confiscated in fee for *treason,* stated what he understood to be the President's opinion, as follows: "He is of opinion that the real estate of rebels cannot, for treason, be confiscated beyond the term of their lives; and if the bill now before the President is allowed to stand as it is, it will be vetoed—we may as well understand it—and solely upon that ground. It is a bill that contains other and very valuable and important provisions." Ib., 3378.

And it was stated by Senator Trumbull, (near the close of the debate on the resolution,) and conceded by Senator Clarke, the author of the amendment, that the first section of the bill was the only one that had any reference to treason.

Mr. Trumbull, on that occasion, said: "This bill, however, as I understand it, does not provide for trying men for treason and forfeiting their property on their conviction for treason. There is no such principle in the bill. It does not change the punishment for treason, and it contains, if I recollect rightly, a provision in the first section authorizing the assessment of a fine. I believe that is retained."

Mr. Clarke.—That is retained.

Mr. Trumbull.—And that fine could be levied, I suppose, upon the real estate, and the real estate sold under that fine?

Mr. Clarke.—The bill so says.

Mr. Trumbull.—I would have preferred that that should have been out of the bill; but there is not in the whole bill, as I understand it—and I wish not to misunderstand it—any other clause, excepting that first section, forfeiting the real estate of a man who is tried for treason. Am I not right?

Mr. Clarke.—That is right.

Mr. Trumbull.—Then why talk about this bill forfeiting the real estate beyond the life of the traitor? It is not in the bill, except it is in that first clause, that you shall get at the real estate by means of a fine. * * * As I understand it, there is not now in the bill any provision for forfeiting the property of a traitor beyond his life, or for any time, except as it will grow out of that first section. The other provisions of the bill for seizing property relate to property that is captured by the army where the person of its owner is not subjected to trial for treason or any other offences. Ib., 3380-1.

It is, therefore, seen that the President's objections to the bill grew out of the constitutional provision in reference to attainder of treason. But it is also clear that the provision of the first section of the act in reference to a fine which might be imposed on the *conviction* of a party for treason was the only part of the bill to which this provision of the Constitution could, by any possibility, have any application. For it was stated and conceded in debate in Congress (and the bill itself shows) that the real estate of one convicted of treason might be sold to pay and satisfy a fine imposed as a part of the punishment of treason.

It was this provision, and this provision alone, in regard to the imposition of a fine by the court under the first section of the act, as a part of the punishment of treason, and a sale in fee of real estate to satisfy that fine, which gave rise to the doubt in the mind of the President as to the constitutionality of the bill.

And it is also clear, that the only object of the amendment to the resolution was to obviate this sole constitutional objection of the President in reference to the operation and effect of a fine imposed under the first section of the act as a part of the punishment of treason.

And this being well understood and fully established, the object and extent of the amendment to the joint resolution is of easy solution, (even if there was any doubt as to the meaning of the same from the words used), as the history of legislation, the cause or necessity of making the act, or foreign circumstances, may be looked into for the purpose of ascertaining the intention of the Legislature in making the act, and which, when ascertained, must be respected and obeyed. 1 Wheat., 115; 4 Gill and J., 152, 153.

In Maynard *vs.* Johnson, 2 Nevada R , 25, it is held that in cases of doubtful construction, or where an act will admit of different constructions, the debates of a legislative body may be resorted to to determine the meaning of a law, where the language of the same is so ambiguous as not clearly to show the meaning intended to be conveyed.

At page 26, of the above case, Mr. Justice Bronson says: "In cases of doubt, and also where a statute will bear opposite meanings, either from inaptness of phraseology or an ungrammatical construction of its several clauses, it is very usual to resort to the discussions of the legislators on the disputed point, with a view to the ascertainment of their

intention. This is authorized and legitimate, both in the interpretation of statutes and constitutions."

And in Canal Company *vs.* Railroad Company, 4 Gill and John. R., 153, the court says: "In Preston *vs.* Browden, 1 Wheat., 115, the Supreme Court of the United States, in construing an act of Assembly of North Carolina, had recourse to the history and situation of the State, and treaties made by that State with the Indians, in order to ascertain the intention of the Legislature, and thereby to arrive at the meaning of the act, and decided that it did not embrace the land in question, though the words of it were sufficiently broad and extensive, on the ground that it did not appear to have been the intention of the Legislature."

From this consideration of the history of the resolution and the law applicable to the same, it is very evident that the joint resolution cannot be held to embrace the confiscations specified in the statute, because such was not the intention of Congress in passing the resolution.

And not only is it clear from the history of the resolution that it was not intended to embrace and apply to confiscations "as enemies' property," but even the very words of the resolution itself show that it was only intended, and can only apply, to *personal* and *criminal* proceedings under the *first* and *second* sections of the act. The words are: "Nor shall any punishment or proceedings under the act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." It is, therefore, seen that the resolution, in express terms, refers *only to offenders* under the penal portions of the statute, the first and second sections being the only parts of the act under which it is possible for any one to be considered an offender, or under which any personal or criminal proceedings could be had.

The provisions of the fifth, sixth, seventh, and eighth sections of the statute relate to persons as enemies, and *not* to offenders. It is, therefore, not to be extended in its operation beyond offenders under the first and second sections of the act, so as to include those who are put, by the other provisions of the statute, on the footing of enemies. The word offender, *ex vi termini,* means one who has violated some positive provision of law, and who is amenable to personal punishment, in some form or other, for his violation of the law. Enemies, as such, (and all the inhabitants of the seceded States, so far as belligerent rights were concerned, have been uniformly held by the Supreme Court of the United States as *enemies,* irrespective of their personal sentiments and dispositions,) are not and cannot be considered as offenders. Offenders are such, under and by virtue of the municipal or statutory law of the land. Enemies, or those who are put upon the footing of enemies, so far as belligerent rights are concerned, are not amenable, as such, to the municipal law relating to offenders, but are alone liable to be dealt with according to the law of nations and the rights which war confers. A citizen may be regarded, so far as belligerent rights are concerned, as an enemy, and yet not be an offender. The Rapid, 8 Cranch, 155; Jecker *v.* Montgomery, 18 How., 114.

In the first of these cases the property of a loyal citizen was condemned as forfeited to the Government, not because the owner was disloyal and an offender, so as to be amenable to personal punishment, but because his conduct in sending a vessel to the enemy's country to bring away his property was intercourse inconsistent with loyalty, and he was, therefore, so far as his property was concerned, to be deemed and taken as an enemy. And so in the case referred to in 18 How., property taken trading with the enemy was

held liable to be condemned as prize of war, because the owner, *pro hac vice*, was to be considered and regarded as an enemy, though not an offender in the proper sense of that term.

And, on the other hand, a citizen may be, and often is, an offender without being an enemy.

When, therefore, we find the word offender used in a statute, as in the joint resolution, it is very clear that it does not include, and was not intended to embrace, any one in his position or relation as an enemy. An offender in law occupies a very different and distinct position from that of an enemy. Offenders are amenable alone to, and are punishable by virtue of the municipal law. Enemies, (or those the law deems such,) on the other hand, can only be dealt with according to the law of nations and the rules which govern in civilized warfare.

It is said, however, in substance, that a citizen engaged in rebellion is not to be considered as an enemy—that he may be regarded as a traitor, but not as an enemy. This is a great mistake. A citizen may at one and the same time be both an enemy and a traitor—an enemy to be dealt with as such whilst the war lasts, and a traitor, to be punished as such only when the rebellion is suppressed and the war at an end. In the language of the Supreme Court of the United States, in the Prize Cases, 2 Black, 674, "they are none the less enemies because they are traitors." But though they are both enemies and traitors, they are not to be dealt with in both capacities at one and the same time—enemies, whilst the war lasts, and traitors, to be punished as offenders when the rebellion is suppressed. Such being the law, it is but fair and reasonable to presume that Congress in passing the act of July 17, 1862, to suppress insurrection, to punish treason and rebellion, to seize

and confiscate the property of rebels, and for other purposes, was well aware of the double position in which those in rebellion had placed themselves, and of its rights to deal with them in one or both of the positions and capacities in which they had placed themselves—that of enemies and traitors. And hence we find that Congress, in the act referred to, made provision as a means of suppressing insurrection for dealing with those in rebellion both as traitors and enemies. For it is for the political department of the Government to fix or determine the status of parties. The provisions of the act, therefore, relating to the different capacities and positions in which those in rebellion had placed themselves, and in which they were liable to be dealt with, are to be regarded and considered as separate and distinct from each other, as though they were embodied in separate and distinct acts. And this is evident from the fact that the criminal portion of the statute could only be enforced after the termination of the war, whilst that relating to the confiscation of enemies' property could only be enforced during the existence of the war. And this being well understood and established, it is very evident that when Congress passed the joint resolution relating alone to offenders, it did not intend that it should extend to or embrace enemies, and the proceedings against them as such, because an enemy cannot be regarded in the eye of the law as an offender. Enemies can only be dealt with as such, and not as offenders. A statute, therefore, which refers to offenders only as the resolution does, cannot be said to extend to and include enemies, or the rights of the Government against them as such, as provided and set forth in the confiscation portion of the act. And not only does the use of the word "offender" in the resolution show that it was only intended to apply to and embrace personal and criminal prosecutions under the first and second sec-

tions of the act, and the consequence which might attach and follow from the same, but the other words of the resolution clearly and unmistakably show that it was only intended by the resolution to tie up and make the act, as far as the punishment for treason and rebellion was concerned, square with the then President's views of confiscating only a life estate for treason. For it says: "Nor shall any punishment or proceedings under the act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

Now, does not this language show, beyond all doubt, that the resolution only refers, and was only intended to refer, to the punishment of treason and rebellion and the proceedings incident to the same? Most clearly, it does. The "punishment and proceedings" referred to can only relate to those personal punishments and proceedings under and by virtue of the provisions of the first and second sections of the statute, they being the only sections of the act under which any proceedings against the person of an offender could be had, or under which any one could be considered an offender. If the resolution was intended to apply to all proceedings under the act, why was the word offender used in the same? The word offender was used to fix the limit of the operation of the resolution; it was to apply alone to those punishments and proceedings which were against offenders.

Besides, to work a forfeiture, according to all the authorities, as we have seen above, is to bring about or produce as a resulting consequence from some prior act or thing.

The resolution, then, like the clause in the Constitution, only provides and guards against mere *resulting consequences*, or consequences which it was supposed would follow, as a matter of course, from punishments and proceedings against offenders under the criminal part of the act.

For Congress might well, in order to obviate the constitutional objection of the President as to the punishment of treason, limit the sale, by the resolution, of the real estate of the *offender,* to pay and satisfy a fine imposed as a part of the punishment of treason to a life estate, without at all modifying the other provisions of the act, confiscating enemies' property absolutely. The motive or occasion for the modification in the one case, would certainly be entirely wanting as to the other.

It would, therefore, seem to be almost a self evident proposition that the joint resolution can only refer, and was only intended to refer to punishments and proceedings under the first and second sections of the statute, and does not embrace, and was not intended to embrace, confiscations of enemies' property under the other provisions of the act. And this would seem to derive great force and strength from the fact, as shown by the act itself, viz: that the object of seizing and condemning the property seized "as enemies' property," was to secure the speedy termination of the rebellion and the support of the army. These being the objects of the confiscation of the enemy's property, is it not evident that the mere confiscation of the life estate only of one liable to be killed in battle the next moment after the confiscation of his property would be next to idle and useless? Who would purchase such a precarious interest during a state of war? And what revenue for the support of the army could have been expected from the sale of a mere life estate in the property seized and condemned as enemies' property? None; actually none. Besides, if only a life estate was confiscable, to whom would the property go on the termination of the life estate during the war? Would it not descend to the heir of the enemy ancestor, and thus again become one of the sinews of war in the hands of the

enemy? And would it not have to be condemned over and over again to make it available for the support of the army? A construction that would lead to such a result and thereby defeat two of the main purposes of the act—the suppression of the rebellion and the support of the army—cannot be a sound and correct interpretation of the resolution.

Seizure and condemnation of the property seized, "as enemies' property," was to, and could only, take place during the war. But the proceedings and punishment for treason could only take place and be inflicted after the suppression of the rebellion and the close of the war. For if, as is said in the books, the sovereign who was endeavoring to reduce his revolted subjects to obedience should hang for treason pending the contest, the insurgents would hang also, by way of retaliation, those of the established government who should fall into their hands, and thus the war would become one beyond the pale of civilized warfare.

Hence, civil wars, for the sake of humanity, are governed by the same rules which obtain in wars between independent nations, the parties on either side, *during the contest*, being regarded and dealt with as enemies and not as offenders. The policy, then, of forfeiting only the life estate in the property of traitors and offenders after the suppression of the rebellion and the close of the war can have no sort of application whatever to the confiscation of enemies' property during the existence of a state of war. The confiscation, then, of enemies' property is a very different and distinct thing from that of punishing offenders. A law relating exclusively to the latter cannot then be said to extend to and embrace the former.

The right to confiscate enemies' property is a belligerent right, political in its nature, and entirely under the power and authority of Congress, and is wholly unfettered by the

provisions of the Constitution relating to the punishment of treason and offenders. 30 Indiana R., 5.

Such being the law, it seems to us that that part of the act of July 17, 1862, relating to the confiscation of "enemies' property," must be held to be separate and distinct from that portion of the act relating to offenders, and that the resolution relates alone to the punishment and proceedings against offenders, and does not apply or extend to those parts of the statute providing for the seizure and confiscation of enemies' property. And as the main purpose of the confiscation portion of the act was the speedy termination of the rebellion, as well as the support of the army, it seems to us that by no fair and reasonable mode of interpretation of the words used in the resolution, can it be held to extend to and limit the confiscation of enemies' property to a mere life estate. To do so would be to extend the resolution, as shown by its history, beyond the intention of Congress in passing the same. To do so would be to give an extent and meaning to the resolution far beyond its import, and which is not warranted by its words. And, finally, to do so would, if the war was still pending, (and the act and the resolution should be construed together as though the war was still in existence,) be to defeat two of the main purposes of the act, the suppression of the rebellion and the support of the army. A construction that would lead to such results, it seems to us, cannot be regarded as a sound or proper construction of the statute, and the resolution passed in connection with the same.

And this is further manifest from the fact that the act and the resolution were both signed on the *same day of the same session* of Congress, and the further fact that the resolution contains no express words of repeal or modification whatever, of any provision of the statute. It can, therefore, only

operate as a repeal or modification of the act by implication, to the extent, *and to the extent only*, to which they are repugnant and *wholly irreconcilable* by any fair and reasonable mode of interpretation.

But before one act of Congress will operate a repeal or modification of another, passed even at a *different* session of Congress, by implication, it must appear that there is a positive and irreconcilable repugnancy between the two.

A repeal by implication is not favored in any case by the courts. The two acts must be reconciled if possible. McCord *v.* Smith, 1 Black., 459; Naylor *v.* Field, 5 Dutcher's (N. J.) R., 287; State *v.* Berry, 12 Iowa (4 Whith.) R., 58; 10 Ohio (N. S.) R., 25; 1 Head's (Tenn.) R., 113; 3 Wallace, 633; 22 How., 311; 25 Ind., 166.

"That statutes may be repealed by implication and without any express words," (there can be no doubt,) "still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of legislation together." Sedg. Stat. and Const. L., 127. And the reason is, "laws are presumed to be passed with deliberation, and with a full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law if the two acts may well subsist together." Ib.

In Ind. School Dist. *v.* Whitehead, 2 Beasley's (N. J.) Ch. R., 291, Chancellor Green well says: "But the repeal of a statute by implication is not favored. Unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force. Courts are bound to up-

hold the prior law if the two may subsist together. The matter must be so clearly repugnant that it necessarily implies a negative. Dwarris on Stat., 674; 1 Bl. Com., 89, and cases cited, note 34, Sharswood's ed.; Beales *v.* Hall, 4 How. U. S., 37; Bowen *v.* Lease, 5 Hill, 221, and cases cited, note a, 225."

In Ludlow's Heirs *v.* Johnson, 3 Ohio, 553, it is said: "When the provisions of two statutes are so far inconsistent with each other that both cannot be enforced, the latter must prevail. *But if by any fair course of reasoning the two can be reconciled, both shall stand.* * * * *No court will, if it can consistently be avoided, determine that a statute is repealed by implication.*"

In Cass *v.* Dillion, 2 Ohio State, (Warden,) 610, the court thus states the law: "As repeals by implication are not favored, the repugnancy between the provisions of two statutes must be clear, and so contrary to each other that they cannot be reconciled, in order to make the latter operate a repeal of the former. This rule is the result of a long course of decisions."

And in McCool *v.* Smith, 1 Black, 470, 471, Mr. Justice Swayne well says: "A repeal by implication is not favored. The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the Legislature together. Sedg. Stat. and Const. Law, 127; 4 Gill. and J., 1; Canal Co. *v.* Railroad Co., 5 Hill, 221; Bowen *v.* Lease, 2 Barb. S. C. R., 316, Williams *v.* Potter."

"Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention which may be collected from the cause or necessity of making the act, or from foreign circumstances; and when discovered ought to be followed, although such construction

may seem to be contrary to the letter of the statute. Plow., 205, 232; 11th Coke Rep., 73; 19th Vin. Abr., 519; 6th Bac. Abr., 384. That, therefore, which is within the letter of a statute is sometimes not within the statute, not being within the intention of the makers. 'If laws and statutes seem contrary to one another, yet if by interpretation they may stand together, they shall stand;' and where two laws only so far disagree or differ as that by any other construction they may both stand together, the rule that *leges posteriores, priores contrarias abrogant*, does not apply, and the latter is no repeal of the former. Roll. Rep., 90, 91; 2d Co. Rep., 5, 6; 11 Coke Rep., 63, 64; 19 Vin. Abr., 519, 525. It is laid down as an established rule, in 19 Vin. Abr., 525, Pl. 132, that 'repeals by implication are things disfavored by law, and never allowed of but when the inconsistency and repugnancy are plain and unavoidable; for these repeals carry along with them a tacit reflection upon the legislators that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another; and such repeals have ever been interpreted so as to repeal as little of the preceding law as is possible;' and in 6 Bac. Abr., 385, that 'where it is manifestly the intention of the Legislature that a subsequent act of Parliament shall not control the provisions of a former act, the subsequent act shall not have such operation, even though the words of it, taken strictly and grammatically, would repeal the former act.' These principles have been recognized and adopted by courts from the time of Roll, Plowden, and Coke to the present day." Canal Co. *v.* Railroad Co., 4 G. & J., 1.

Nor is this rule to be departed from on any pretence or suggestion that the spirit of the resolution is more comprehensive than its words import. For, as is well said by Mr Justice Thurman, in Cass *v.* Dillon, 2 Ohio State, (Warden,)

612, "when was an enlarged meaning given to a statute beyond the import of its words, in order to repeal another statute by implication? We have met with no such case, and none has been pointed out to us."

And this is more especially the case where the two acts (as in this case) were passed not only at the same session of Congress, but actually approved by the President on the same day. For, in the case of acts passed at the *same* session of the Legislature, it is well settled that the ordinary rules of construction employed to determine whether former laws have been repealed by the enactments of a subsequent Legislature, are *inapplicable, and the rule is that the whole must be taken as one act, and that nothing short of a direct, express, repeal in terms, or such irreconcilable repugnancy as that both cannot stand together*, and one consequently must give place to the other, and operate its repeal by implication, has, it is believed, ever been held sufficient to justify a court in holding one act repealed by another passed at the *same session*. Cain *vs.* The State, 20 Texas R., 355, 365; Peyton *vs.* Mosely, 3 Monroe's (Ky.) R., 80; Sedg., Stat. and Const. Law, 415; Neill *vs.* Reese, 5 Texas, 33; 2 Blackf., 249.

In Cain *v.* The State, 20 Texas, the question was, whether or not an act of the Legislature, which authorized the county courts of the State to grant a license for the retail of intoxicating liquors in quantities less than a quart, and imposing a license tax for such privilege, and prescribing a penalty for selling without such a license, was repealed by the provisions of the Penal Code of Procedure enacted at a subsequent period of the *same session*, and which contained a repealing clause, and after enumerating a great many criminal laws of former sessions, concluded as follows: "And all other laws and parts of laws relating to crimes and punish-

ments are hereby repealed;" and the court, in an elaborate and well-considered opinion, held that the former act of the same session (and which related to crimes) was *not* repealed even by this broad and comprehensive language of the repealing clause, and that the conviction of the defendants under the former act for a violation of its provisions was good.

At pages 358-365, of the above authority, Mr. Justice Wheeler, after quoting the statute, well says: "The material question to be determined is, whether this act was repealed by acts of a later date, passed by the same Legislature. * * * * *

"In considering the question, it is important to observe, that both the act supposed to be repealed and the supposed repealing act are acts of the same Legislature. This, it is conceived, renders inapplicable the ordinary rules of construction employed to determine whether former laws have been repealed by the enactments of a subsequent Legislature. By attending to this distinction, and applying the rule which governs the construction of acts passed at the same session, the question, we think, is free from difficulty. The rule is, that in the construction of acts of the same session, the whole must be taken and construed as one act, and to make a latter provision repeal a former, there must be an express repeal or an irreconcilable repugnancy between them; and then the latter will control. (3 Moore, 77; Sedg. on Stat. and Const. Law, 415.) The case of Peyton *vs.* Moseley, determined in the court of appeals of Kentucky, is a stronger case, it is conceived, of the apparent repeal, by the Legislature, of a prior act, by one subsequently passed at the same session, than the legislation in question affords; and yet the court held there was no repeal. An act of the Legislature prescribed the form of a recognizance

to be taken in certain cases, concluding with the words, 'witness my hand and seal.' A subsequent act of the same session abolished the use of seals, putting sealed and unsealed instruments on the same footing. It was insisted that the latter act repealed the former. But the court said: 'It is true, as observed by the court below, the expressions of this latter act are very broad, and if it had not passed at the same session with the former, it might, by the ordinary rules of construction, be held to repeal the former *pro tanto*. But with regard to acts passed at the same session, we apprehend that the rules of construction are somewhat different. When they are compared together, they ought to be construed as one act on the same subject; and the presumption of so sudden a change or revolution in the minds of the Legislature ought not to be indulged. There ought to be an express repeal, or an absolute inconsistency between the two provisions, to authorize a court to say that the latter had repealed the former. If both these provisions were in the same act, both must have effect, if possible. Hence, the conclusion would be, that the recognizance directed to be taken with a seal, in which the bail stipulated for the principal, ought to be held as an exception to the general provision which dispensed with a seal.' (3 Monroe, 80.) And thus the court, instead of holding acts, of the same session, apparently repugnant, the one to repeal the other, gave effect to both, although in order to do so it became necessary to engraft the former upon or incorporate it in the latter act as an exception to its provisions."

"It is not to be supposed, nothing short of expressions so plain and positive as to force upon the mind an irresistible conviction, or absolute necessity, will justify a court in presuming that it was the intention of the Legislature that the acts passed at the same session should abrogate or annul one

another. The decent respect due a co-ordinate department of the Government would seem to forbid that such a presumption be indulged in by the court. As we had occasion to say in Neill *vs.* Keese, 'it would not be a reasonable mode of construing acts of the Legislature so to construe them as to make one act repeal another passed at the same session. It cannot be supposed that it was their intention that acts thus passed should abrogate and repeal one another.' 5 Tex. R., 33.

"If the minds of the Legislature had really undergone so sudden a revolution, it seems impossible to doubt that they would have made it known, and removed all occasion for controversy on the subject by a direct express repeal of the act in terms."

"Nothing short of a direct express repeal in terms, or such irreconcilable repugnancy as that both cannot stand together, and one consequently must give place to the other and operate its repeal by implication, has, it is believed, ever been held sufficient to justify a court in holding one act repealed by another passed at the same session."

"There must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy." Daviess *v.* Faribain, 3 How., 646; Wood *v.* United States, 16 Pet., 362.

Tested by the principles of the foregoing authorities, the resolution cannot be considered as a repeal or modification of the confiscations provided for in the act. The utmost that can possibly be claimed for it is a modification or limitation of the sale of the real estate of a convicted traitor, to pay and satisfy any fine imposed by the court as a part of the punishment for treason, to the term of the life of the traitor. This is the source of its origin and the

ultima Thule of its destination, and beyond this it cannot go.

And with this consideration of the resolution and the highest respect and regard for the opinion of the Supreme Court of the United States, in Bigelow *v.* Forrest, we venture to say that we entertian no doubt whatever but that when the question therein decided comes again before that learned court and is fully and fairly argued before the same, the decision will be that confiscations in fee under act 17th July, 1862, are legal and valid.

But if it should be thought, or even conceded, for the sake of argument, that the resolution was a modification of the specific confiscations provided for in the act, and a consequent concession to the views of President Lincoln, that Congress could only forfeit a life estate for *treason*, then it may be said, and said successfully, that such concession and modification were shortly afterwards entirely departed from, both on the part of the President and Congress, by subsequent legislation.

By the act of twelfth of March, 1863, (12 U. S. Stat., 820, ch. 120,) provision is made for the appointment of special agents by the Secretary of the Treasury to receive and collect captured and abandoned property in States, &c., designated by the proclamation of the President of July 1, 1862, as being in insurrection. Provision is also made in said act for the sale and disposition of such property, and the payment of the proceeds into the Treasury of the United States. And it is further provided in this act that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property,

of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expenses of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

From this provision it is seen that *the only remedy* for a loyal citizen whose property had by mistake or otherwise been sold under the act was to apply to the Court of Claims, (and this only by virtue of said act,) and on proof of loyalty and ownership, he might recover the net proceeds.

And but for this provision in the act, the loyal owner would have been without any remedy whatever. Not only would his property have passed absolutely to the purchaser of the same from the Government, but he would have had no claim whatever to any part of the proceeds arising from the sale of the same.

Such being the law, then, in reference to loyal owners of captured or abandoned property, is it not manifest that the disloyal have no right or claim whatsoever to either the property condemned and sold, or the proceeds thereof?

And by reference to the act of July 2, 1864, (13 U. S. Stat. 375, ch. 225, §§ 2 and 3,) it will be seen that provision is made for taking possession of abandoned houses and lands by the special agents authorized by the above act of 1863, and the first section of *the latter act is extended* so as to include the descriptions of property mentioned in "An act entitled 'An act,' &c., and "An act entitled 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' approved July seventeenth, eighteen hundred and sixty-two."

And it is further provided, in the latter part of section 3 of the aforesaid act of 1864, (13 U. S. Stat., 376,) as follows: "That all property, real or personal, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged either in arms or otherwise in aiding or encouraging the rebellion."

From these provisions it is seen that the principle and provisions of the act of 1863, in relation to *both* captured and abandoned property are directly applied and extended to all property mentioned in the confiscation act of the seventeenth July, 1862. And as confiscation and sales, under said act of 1863, were in fee, even though the same might have belonged to loyal citizens, it follows, as a matter of course, that when the principles of that act were applied, as we have shown above, to property mentioned in the act of 1862, sales under the latter act were in any event, also in fee.

For it is hardly to be supposed that Congress intended to confiscate loyal citizens' property in fee, as stated above, and only forfeit the life estate of rebels and traitors and enemies. To do so would be to punish loyalty with greater severity than disloyalty. To do so would be to punish the innocent and reward the guilty. To do so would be to discourage loyalty and to hold out a premium to insurrection and rebellion. A construction that would lead to such absurdities and such unjust results cannot receive the countenance of any court.

We therefore conclude that whatever might have been the scope and object of the joint resolution, it was repealed by reason of the incompatibility of subsequent acts with the same. For if the resolution be held to repeal or modify the act of 1862 by implication as to confiscation, the application of the like rule and principle must make the subse-

quent acts to which we have referred entirely abrogate the resolution, as confiscations by the latter acts are and were intended to be in fee.

In any and every possible view, then, we think it clearly established, both on the score of authority and subsequent legislation, that confiscations in fee, under the act of 1862, are legal and valid, and this more especially so after the passage of the captured and abandoned property acts of 1863 and 1864.

DECREES IN FEE.

X. *Condemnations in fee not void, but only voidable, even if only a life estate was confiscable.*

The district and circuit courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of that term. Kennedy *v.* Georgia State Bank, 8 Howard, 586; Ex parte Watkins, 3 Pet., 193; Chemung Bank *v.* Judson, 4 Selden, 254; Wright *v.* Marsh, 2 Iowa, 94; Wood *v.* Moran, 1 Sum., 580; Skilleru's Exs. *v.* May, 6 Cranch, 267; McCormick *v.* Sullivan, 10 Wheat., 199; Baldwin *v.* Hale, 17 J. R., 272; Reed *v.* Vaughan, 15 Missouri, 137, 141–2; Rowan *v.* Holcomb, 16 Ohio, 463, 465; Thompson *v.* Lyle, 3 Watts & Serg., 166.

They are to be regarded and considered as domestic courts, of superior and general jurisdiction as to all matters over which they are by the Constitution and laws of the United States invested with jurisdiction and authority. Gillett *v.* Powel, 1 Spear's Eq. R., 142, 144; Ex parte Hall, 5 Nevada, 158; Adams *v.* Way, 34 Cal., 413; Reed *v.* Vaughan, 15 Missouri, 137, 141–2; Bowan *v.* Holcomb, 16 Ohio, 463, 465; and foregoing authorities.

For it is well settled that limitation of power does not

necessarily imply inferiority. Peacock *v.* Bell, 1 Saunders, 15.

And the rule is, that where a general authority is given by statute to a superior court over all matters of a given class, the court, in the exercise of the new power or authority thus conferred, will not be regarded as an inferior court. Harvey *v.* Tyler, 2 Wallace, 328, 342; Voorhies *v.* Bank of the United States, 10 Pet., 449; Grignon's Lessee *v.* Astor, 2 How., 319; Kemp's Lessee *v.* Kennedy, 5 Cranch, 173; 18 New York, 592; 28 Ib., 653; 34 Cal., 412-13; Reed *v.* Vaughan, 15 Missouri, 137; Rowan *v* Holcomb, 16 Ohio, 463.

In Rowan *v.* Holcomb, 16 Ohio R., 463, 465, the supreme court of Ohio says: "The district court is a court of record, created under the powers of the Constitution of the United States, having jurisdiction over matters of bankruptcy, by the acts of Congress. Matters of bankruptcy, by the act, are conferred upon the district court as a part of its general jurisdiction; and in principle its orders of final discharge may be pleaded precisely as the judgments and decrees of any court of general jurisdiction."

And in Reed *v.* Vaughan, 15 Missouri R., 137, 141, Mr. Justice Scott said: "The courts of the United States, though possessing a limited jurisdiction, yet, in the intendment of law, stand upon the same footing as courts of record of general jurisdiction. All the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States. In pleading a judgment or decree of one of these courts, there is no necessity for showing the facts which confer jurisdiction than in a plea of judgment of the highest tribunal known to the law. Their judgment cannot be impeached for error or irregularity in a collateral proceeding; they can only be

vacated on motion in the courts in wnich they are rendered, or reversed from error in an appellate jurisdiction."

The district courts of the United States are courts of record, and are not to be regarded as inferior courts, so that their proceedings in causes not within their jurisdiction may be deemed void and questioned collaterally. Thompson *v.* Lyle, 3 Watts and Sergeant's R., 166.

At page 168 of the above authority Kennedy, J., says: "Though the district court of the United States be one of those tribunals which Congress under the Constitution has established, and, in reference to the Supreme Court, thereby directed to be established, is denominated an *inferior* court, yet I take it that neither the *district* courts nor the *circuit* courts of the United States are of *inferior* jurisdiction, at least not so as to render their process and proceedings in causes, without their jurisdiction, absolutely void. See Stanley *vs.* The Bank of America, 4 Dall., 11; McCormick *vs.* Sullivan, 10 Wheat., 102; 1 Kent's Com., 303." S. P. Kemp's Lessee *vs.* Kennedy, 5 Cranch, 173.

Such being the character of the courts of the United States, it follows that even if the joint resolution was a modification of the confiscation portion of the act, so as to limit the confiscation of enemies' property, under the same, to a mere life estate, (and even were the resolution not repealed by implication by the provisions of the captured and abandoned property acts of 1863 and 1864,) still, as the district courts of the United States had jurisdiction of the subject-matter of confiscation under the act of 17th July, 1862, and a consequent right to condemn the property in some form, (either in fee or for life,) the condemnation in fee is not void in any event, but at most *only voidable*. Butler *vs.* Potter, 17 J. R., 145; Knowles *vs.* Muscatine, 20 Iowa, 249; Easton *vs.* Calender, 11 Wend., 90, 95; Henderson *vs.* Brown, 1 Caines'

R., 102; Grignon's Lessee *vs.* Astor, 2 How., 341; Griffin *vs.* Mitchell, 2 Cow., 349; Adkins *vs.* Bremer, 3 Cow., 209; Vail *vs.* Owen, 19 Barb., 26; Kemp's Lessee *vs.* Kennedy, 5 Cranch, 173.

"It is only where a judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or judgment rendered that the order or judgment is wholly void." Hobart *vs.* Frost, 5 Duer, 673.

In the case of Butler *vs.* Potter, 17 J. R., 145, the court says: "The justice had jurisdiction to give judgment for costs; although he was limited as to the amount, and gave judgment for more than he ought, it was an erroneous, not a void, judgment. The case of Prigg *v.* Adams, (2 Salk., 674,) is in point." * * * "The distinction is this: Where the justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice*, but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable only."

In Henderson *v.* Brown, 1 Caine's Rep., 102-3, where assessors were sued in trespass for assessing a theatre as a dwelling-house, Mr. Justice Kent said: "I distinguish this case from those cases in the English books, where the assessors and collectors of their land-tax have been held responsible. The assessors had no authority at all over the subject-matter which they included in the tax. Here the theatre was required to be assessed by the assessors; if a dwelling-house, then as such; if not a dwelling-house, then as a lot of ground, with due regard to the improvements thereon. * * The assessors had jurisdiction of the subject-matter. They were bound to assess that building in the one view or the other; and in the exercise of that duty, it is alleged and admitted that they did not exercise their judgment duly. But this is very different from the case in which they were not

to exercise any judgment at all over the subject, in which they had stepped out of their path, and taken cognizance of a subject not at all delagated to them. In such an instance their proceedings would have been truly *coram non judice*, and they trespassers. Here the subject was by law *sub judice*, and the grievance is a mere error or mistake by them while in the exercise of a lawful jurisdiction."

And in Easton *v.* Calendar, 11 Wend., 90, it was *held*, by Mr. Justice Nelson, that notwithstanding the trustees, in apportioning a school-tax among the taxable inhabitants, must apportion only the sum voted, and not include therein, in making the apportionment, the *percentage* allowed by law to the collector for collecting the tax, the trustees who had made up the apportionment upon the sum voted and the percentage, although erroneous, were not liable in trespass for causing property to be sold in the collection of the tax.

And the reason assigned for this decision was, that the trustees had jurisdiction of the subject-matter of the apportionment of the tax, and that, consequently, though their action in the matter in assessing more than the law allowed was erroneous, the assessment was not absolutely void, but only voidable, and therefore valid till reversed or set aside in the manner provided by law.

In Knowles *vs.* The City of Muscatine, 20 Iowa R., 248, it was *held* that an order of a court establishing a road of greater width than was authorized by the statute was not void, but irregular or erroneous merely, and was valid until reversed.

At page 249 of the above case, the court says: "The inquiry is, was the order void or erroneous merely? It appears that the county court *had full and complete jurisdiction over the parties and the subject-matter*. The order made was never appealed from, but remained in full force and virtue.

Under such circumstances, we incline to the opinion, and so hold, that the order was not void, but irregular or erroneous merely."

Mr. Justice Miller, in Harvey *vs.* Tyler, 2 Wall., 328, 346, in answer to the objection that the judgment exonerating land for taxes accrued after the passage of the statute was null and void, because the act only authorized an exemption for taxes accrued before the passage of the act, said: "If this were true, we do not feel sure that, under the principles just considered, it would invalidate the judgment of the court. It would be a mistake as to the law, which would make the judgment erroneous; but would it, therefore, be void?"

And in Grigon's Lessee *v.* Astor, 2 How., 319, 340-1, Mr. Justice Baldwin, in speaking of the force and effect of a judgment and the protection of purchaser under the same, well said: "A purchaser under it is not bound to look beyond the decree; if there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded or misconstrued the plain provisions of the law which gave them power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error."

From this consideration of the authorities it is evident that confiscations in fee cannot, in any event, be regarded as void, but only *voidable*.

And this distinction is of the greatest importance. For if a reversal should ever be had on any ground in any case, it is of the utmost importance, for the protection of *bona fide* purchasers at judicial sales as well as the protection of the officers of court, that the reversal should be (as we have no doubt but that it will be) placed on the proper ground—

that of voidable or erroneous and not void decrees. For if the decrees were held void the sales under the same would be null, even as to *bona fide* purchasers, and all the officers of court lible as trespassers. A conclusion which would lead to such results it is believed will never be reached by any court, when there can be no doubt but that the court had jurisdiction of the subject-matter of confiscation and only erred, *if at all*, in the construction of the law as to whether a fee on a life estate should be condemned.

L Madison Day
A. G. Riddle
of Counsel